No. 2688

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH K. BLAIR and THOMAS ADDIS,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

J. J. DUNNE,
ALLEN G. WRIGHT,
Attorneys for Plaintiff in Error, Ralph K. Blair.

T. E. K. CORMAC,
Of Counsel.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR PLAINTIFFS IN ERROR.

GENERAL STATEMENT OF THE CASE.

This is a test case designed to clarify a phase of the law of neutrality; the trial court below departed from the usual procedure in criminal causes; no witnesses were sworn or testimony taken; the parties stipulated that the facts set forth in a written statement, filed and read in the cause, were "the facts in the cause, and that upon a consideration of said facts the court may instruct the verdict which the jury shall render in said cause"; save and except this written agreed statement of facts, no other showing of fact was made; the ordinary rules which obtain where questions of fact are dependent upon conflicting evidence, or where the District Judge had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, are inapplicable here; and this court is in no way embarrassed by those rules in putting upon the agreed statement of facts that construction which this court may regard as proper.

This cause comes up from San Francisco, in the Northern District of California. On July 8, 1915, an

indictment was returned by the local grand jury against the Blair-Murdock Company, a corporation, Ralph K. Blair, Thomas Addis, Harry G. Lane, Kenneth Croft and C. D. Lawrence. This indictment was in two counts. The first of these counts charged that the persons named did, on or about March 15, 1915, at San Francisco, California, "willfully, unlawfully, wickedly, corruptly and feloniously conspire", together, and with divers unknown persons, to commit offenses against the United States. It was then alleged that the defendants, at the time and place aforesaid, "knowingly, willfully, unlawfully, wickedly, corruptly and feloniously did conspire" together, and with divers unknown persons, "to wilfully, unlawfully and knowingly hire and retain within the territory of the United States", certain twenty-five named persons, "to go beyond the limits and jurisdiction of the United States", with the intent on the part of those twenty-five named persons to enlist and enter in the service of the King of Great Britain and Ireland as soldiers, and with the intent on the part of the defendants that those twenty-five named persons should be enlisted and entered in the service of the aforesaid foreign prince as soldiers. It was further alleged that the asserted conspiracy was continuously in existence and process of execution throughout all of the time from and after March 15, 1915, and at all the times mentioned in the indictment, and at the time of the alleged commission of the overt acts alleged. The indictment then proceeded to set forth the alleged overt acts, but charged such acts, however, only as against Ralph K. Blair, Kenneth

Croft, Thomas Addis and Harry G. Lane, no claim being made that any overt act was committed by either the Blair-Murdock Company, or by C. D. Lawrence.

As against Ralph K. Blair, it was alleged, as overt acts committed by him, that he received from one A. Carnegie Ross certain sums of money which he, Blair, deposited in bank to his account, or to that of the Blair-Murdock Company; that he, Blair, purchased certain railway tickets; and that he paid certain money to a railway company. The moneys which Mr. Blair received from Mr. Ross are alleged to be as follows:

	Place.	Amount.	Where Deposited.	Whose Accour
31	San Francisco.	$400	Bank of California.	R. K. Blair.
13	"	240	"	"
18	"	960	"	"
8	"	2409.50	"	Blair-Murdock Company.
15	"	2115.00	"	"

The railway tickets were alleged to have been purchased as follows:

	Place.	From Whom.	Amount Paid.	Railroad.	Destinatio
7	San Francisco.	T. Cook & Sons.	$452.20	Southern Pacific Company	New Yo City.
8	"	"	1938.00	"	"
6	"	"	1820.80	"	"

And the only sum of money paid to the railroad company was alleged to be the sum of $425.40 paid on

June 2, 1915, to the Southern Pacific Railroad Company at San Francisco, California.

As against the defendant Kenneth Croft, it was charged, as alleged overt acts, that on June 19, 1915, at Chicago, Ill. he sent to Ralph K. Blair, in care of the British Friendly Association of San Francisco 2 telegrams: as against the defendant Thomas Addis, it was charged, as an alleged overt act, that on June 14, 1915, at San Francisco, he made a physical examination of four named persons, and as against the defendant Harry G. Lane, it was charged as an alleged overt act that about June 14, 1915, at San Francisco, he engaged lodgings for about twenty men, among whom were three named persons.

The second count in this indictment is in the same language as the first, except that it charges that the twenty-five persons referred to in the early portion of the count were to become "marines and seamen aboard a vessel or vessels of war", instead of "soldiers".

Upon the coming in of this indictment the defendants attacked its sufficiency through their demurrers and motions to quash: but the learned judge of the court below overruled the demurrers and denied the motions to quash, the defendants excepting; and thereupon the defendants entered thir pleas of "not guilty".

While these proceedings were taking place, the British Embassy and the Department of Justice both became very anxious to have the court's opinion on this case (Bill of Exceptions, Trans. page 129); and in view of that, counsel "stipulated as to what the facts are

in this case'' (Bill of Exceptions, Trans. page 97), and that upon a consideration thereof the court may instruct the verdict which the jury shall render in the cause. In other words, the court was to pass upon the sufficiency of the stipulated facts to warrant a conviction; ''that is exactly what it means'' (Bill of Exceptions, Trans. page 98). Thereupon, a jury was impaneled, and the agreed statement of facts, and the exhibits attached thereto, were read to the jury by the United States Attorney (Bill of Exceptions, Trans. page 99). When the reading of the agreed statement of facts and its exhibits was concluded by the United States Attorney, the following occurred:

> ''Mr. DUNNE. And upon that showing as I understand it, Mr. Preston, the Government rests.
> Mr. PRESTON. That is our case.''

''The foregoing 'Agreed Statement of Facts' and the exhibits 'A', 'B', 'C', 'D', 'E', 'F', and 'G' thereto attached, constituted and was the whole and entire showing of fact made in the above entitled cause; and no other showing of fact or facts, save and except said 'Agreed Statement of Facts' and said exhibits attached thereto, was presented in said cause to said court and jury or either of them; and no testimony or evidence of any character or description, whether oral or written, was received by or placed before, said court or jury in addition to the above-mentioned 'Agreed Statement of Facts' and said exhibits thereto attached.''

> ''Mr. DUNNE. The defendants now move the court for an order in this cause directing a verdict on the showing made here by the Government in favor of the defendants, acquitting and discharging them from all criminal

> responsibility under this indictment, and exonerating the bail of them, and of each of them'' (Bill of Exceptions, Trans. pages 128, 129).

This motion was thereafter argued and submitted to the court below; and on October 27, 1915, the learned judge of that court stated his views of the case to the jury to the effect that as to the defendants Blair and Addis, the defendants' motion should be denied as to the first count in the indictment (the soldiers count), but granted as to said defendants Blair and Addis as to the second count (the marines and seamen count), and granted as to all the other defendants upon both counts. And in accord with these views, the learned judge directed the jury to

> ''render a general verdict of not guilty as to defendants Blair-Murdock Company, C. D. Lawrence, Harry G. Lane and Kenneth Croft. As to the defendants Ralph K. Blair and Thomas Addis, you will return a verdict of guilty on the first count, and not guilty upon the second'' (Bill of Exceptions, Trans. page 152).

To this direction and instruction of the learned judge, the defendants reserved timely, proper and complete exceptions, which are set out at length in the Bill of Exceptions (Trans. between page 152 and page 170).

Thereupon, the jury in the cause made, gave, rendered and returned its verdict in conformity with the instruction and direction of the learned judge of the court below; and to that verdict, the defendants Blair and Addis reserved their exception in so far as such verdict found them guilty upon the first count in the indictment, for the reasons and upon the grounds stated

by the defendants when noting their exceptions to the charge of the court to the jury in the instant cause. This exception was disallowed and denied by the court below, to which ruling the defendants Blair and Addis, each for himself, and not the one for the other, then and there duly excepted. Thereupon the cause was continued for judgment until Saturday, October 30, 1915.

On this last mentioned date, the cause coming on for judgment, the defendants Ralph K. Blair and Thomas Addis moved the lower court for a new trial of the above entitled action, their motion in that behalf appearing in full in the record in this cause, but the court denied said motion, to which ruling the defendants, and each of them, respectively, noted and reserved an exception. Thereupon, the defendants Blair and Addis moved the court below in arrest of the judgment in the action, which motion in arrest of judgment is part of the record herein; but said motion was denied by the learned judge of the court below, to which ruling the defendants, and each of them, respectively, noted and reserved an exception. Thereupon judgment was pronounced to the effect that each of the defendants pay a fine in the sum of $1000, with the usual alternative; and to this sentence and judgment of the court, the defendants, and each of them, duly excepted.

It will thus be seen from this recital of the course taken in this cause in the court below that the cause was not treated there, either by the parties or the court, as an ordinary criminal cause. In some respects the procedure adopted was unusual and a departure from

the ordinary course of things. The case is really a test case, designed, as already pointed out, by both the British Embassy and the Department of the Attorney General of the United States, to clarify the law relating to the general subject matter of neutrality; and in the effort to reach the desired result, both sides of the case helped so far as possible. Another characteristic of the cause as presented in the lower court is that no witnesses were there sworn, nor was any other showing of any character made except that contained in the agreed statement of facts and the exhibits attached thereto. This, therefore, is not a case where questions of fact are dependent upon conflicting evidence, and where the district judge had the opportunity of seeing the witnesses, and judging their appearance, manner and credibility: on the contrary, this case falls within the class of cases where, either there is no conflict whatever concerning the facts, or the testimony is taken out of the presence and hearing of the district judge, as where it is taken by deposition, or before a master appointed for the purpose. Here, the cause was heard and determined in the lower court upon a written record only, to wit: the agreed statement of facts, and the exhibits thereto attached; and consequently, this court is quite as well able to judge of and concerning the facts disclosed by that written record, as the learned judge of the court below. This distinction has been recognized by this court in *Paauhau Sugar Plantation Company v. Palapala,* 127 Fed. 920, 923-4.

The full specification of errors which are to be relied upon in this court now follow (Trans. pp. 181 to 200):

SPECIFICATION OF ERRORS.

1. That the said District Court erred in denying the motions of the said defendants to quash the indictment filed in said cause upon the grounds in said motions set forth, and erred in denying the said motions of the said defendants to quash each count of said indictment upon the grounds in said motion set forth, and erred in denying the said motions of the said defendants to quash each count of said indictment upon each and every ground in each of said motions assigned (Trans. p. 181).

2. That the said District Court erred in overruling the demurrers of the said defendants to the indictment filed in said cause upon the grounds in said demurrers set forth, and erred in overruling the demurrers of the said defendants to each count of said indictment upon the grounds in said demurrers set forth, and erred in overruling the demurrers of the said defendants to each count of said indictment upon each and every count of demurrer thereto in said demurrers assigned (Trans. p. 182).

3. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "It may not be amiss to state at the outset that Section 10 is designed to protect the sovereignty of the United States, and could be violated as well at a time of universal peace, as it could be at a time of almost general war. In

other words it is not essential to a violation of this section that war should exist anywhere at the time of such violation, although in times of war among other nations with which this government is at peace, a violation of the section on behalf of one of the belligerents by hiring or retaining men here to go abroad with intent to enlist in the army or navy of such belligerent and assist in carrying on the war against other nations with which this government is upon friendly terms, might well be regarded by the government with greater gravity, as rendering more difficult its position as a neutral power'';

and therein did misdirect said jury (Trans. p. 182).

4. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

''Some of the defendants, and particularly Blair and Addis, were acting in concert and with a well-defined purpose on their part to accomplish some certain things does not admit of doubt. Together they formed the British Friendly Association the purpose of which was to transport to New York British subjects sound in body and limb. It is not to be conceived and indeed all of the circumstances negative any such conception that they expected the journey of the men so transported to end at New York. The ultimate destination of these men was some point in the British Empire, and the defendants knew it, and were jointly engaged in sending them there'';

and therein misdirected said jury (Trans. p. 183).

5. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

''They (said defendants) had associated themselves together to transport to New York British subjects, sound in body and limb, whose ultimate destination was England, and at least a majority of whom intended to enlist there in the military or naval service, and all of whom the

defendants supposed, believed and presumed would so enlist'';

and therein misdirected said jury (Trans. p. 183).

6. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> ''And indeed as it was the manifest purpose and intention of defendants that those sent by them from San Francisco should go beyond the limits of the United States, and as it was equally the purpose of the men so sent to go beyond such limits, our inquiry is narrowed to the ascertainment of the meaning of the words 'hires or retains' as used in the statute and to determining whether such meaning applies to the things for the doing of which the defendants were associated'';

and therein misdirected said jury (Trans. pp. 183, 184).

7. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> ''To hire in its ordinary significance, and we should here seek no other means, 'to contract for the labor and services of, for a compensation, to engage the services of, employ for wages, salary or other consideration; to engage the interest of, agree to pay for the desired action or conduct of', and this has been the meaning of the word since it was first used in the statute in question and its predecessors. It is not essential to a hiring that the consideration be pecuniary, or that it be paid at once'';

and therein misdirected said jury (Trans. p. 184).

8. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> ''In a case tried in 1855, involving the construction of this statute, (United States vs. Hertz, 26 Fed. Cases, No. 15357) the Court instructed the jury as follows: 'The hir-

> ing or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an agreement that he shall pay wages when the services shall have been performed. A person may be hired or retained to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give a person a railroad ticket that cost $4.00, and board and lodge him for a week is as good as a consideration for the contract of hiring, as to pay him the money with which he could buy the railroad ticket and pay for his board himself' '';

and therein misdirected said jury (Trans. pp. 184, 185).

9. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> ''And in an exhaustive opinion rendered by Attorney-General Cushing in that same year is found the following: 'It is possible, that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offense. That would be a mere delusion. The words of the statute are ''hire or retain''. It is true, our act of Congress does not expressly say, as the British Act of Parliament does ''whether any enlistment money, pay or reward shall have been given or not'', nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under the name of board, passage money, expenses or the like, it would be idle to pass acts of Congress for the punishment of this or any other offense'. I have adopted these quotations because they seem to me to state accurately the meaning of the law, to be well within its terms, and to

afford the only construction that will render it effective for the purpose for which it was intended'';

and therein misdirected said jury (Trans. pp. 185, 186).

10. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

''The fact that other countries, having laws for compulsory military service, have assisted their subjects in this country to return to their native land is a false quantity here, and one with which we have nothing to do. It throws no light upon the questions which we are to consider. The case on trial must be determined upon its own particular facts without regard to what has been done either here or elsewhere by persons not included in the present indictment'';

and therein misdirected said jury (Trans. p. 186).

11. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

''Nor is there here involved any question as to the right of individuals to go from this country either singly or in groups to another country with intent there to enlist. The sole question here is, do the facts before us show a conspiracy on the part of defendants to violate the statute which we have been considering'';

and therein misdirected said jury (Trans. p. 186).

12. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

''It would be taxing credulity to the utmost to urge that with the lists and instructions, the defendants did not know that what was sought by the Consul-General was men who would go to England there to enlist in the military or naval service. They were 'to give no pay or advance'.

> It is not stated 'pay or advance' for what. They were 'to make no engagements of any description whatever'. It is not stated in the instructions what they were to do in this regard, but they were to examine the men to see if they were suitable, and to send them on, not more than 50 at a time. Evidently while under the instructions they could make no engagements, they certainly could come to some understanding with the men that they should be sent forward for some purpose for which, after a physical examination they were found to be 'suitable'. They were 'to give no information as to pay, allotments etc.' Pay or allotments for what? The instructions do not state, but the facts show that all British soldiers and seamen receive a daily pay and may receive pensions and allotments after their service is terminated, and that this was known both by defendants and by the men transported'';

and therein misdirected said jury (Trans. p. 187).

13. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "The men pending and after examination were kept at boarding and lodging houses until a sufficient number was assembled for 'orderly transportation'. All this was designed, and defendants knew it, to secure men to return to Great Britain and enlist'';

and therein misdirected said jury (Trans. pp. 187, 188).

14. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "They (said defendants) examined the men, boarded them, lodged them, transported them in squads to New York, where they expected them to report to the British Consul for further examination and further transportation'';

and therein misdirected said jury (Trans. p. 188).

15. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "Defendants knew what they expected the men to do, and the men in turn knew what was expected of them. Defendants, in the language of the stipulation, supposed, presumed and believed that the men would go to England and there enlist in the military or naval service, and a majority of the men intended to do so; they were furnished board, lodging and transportation for that reason alone";

and therein misdirected said jury (Trans. p. 188).

16. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "The offer of defendants was, even though never put into words, 'if you men, having been found after examination, physically suitable, will go to England and enlist, we will furnish you with board and lodging while you are here awating examination and transportation, and we will furnish you with transportation to New York, and sustenance during the trip' ";

and therein misdirected said jury (Trans. pp. 188, 189).

17. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "And this offer the men accepted by submitting to examination, by accepting board, lodging, sustenance and transportation, with the intent in the majority of them at least to do the thing desired";

and therein misdirected said jury (Trans. p. 189).

18. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

"It would be to look onto the form in utter disregard of the substance to accept as a sufficient response to all these facts the statement that at no time did defendants or any of them expressly say in words to any of the men that they should enlist in the service of Great Britain as soldiers, sailors or marines. Just as it would be to regard the form alone and disregard the substance to believe, in view of all the facts, that when the Consul-General turned over to Harris of the Friendly Association the lists of so-called 'Volunteers', with the manifest intention that they should be used, the instructions accompanying them were designed for any other purpose than to secure here men to go beyond the limits of the United States for enlistment, without appearing to have violated the law; to accomplish in fact the results against which the statute is directed, and to do the things therein forbidden without appearing to do so";

and therein misdirected said jury (Trans. p. 189).

19. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

"While therefore it may be true that they (said defendants) believed they were acting within the law, I am of the opinion, for the reasons stated, that some of the defendants, did enter into the conspiracy as charged in the indictment, and that defendant Blair for the purpose of effecting the object thereof committed some of the overt acts charged";

and therein misdirected said jury (Trans. p. 190).

20. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

"As to defendants Ralph K. Blair and Thomas Addis, it will be * * * denied as to the first";

and therein misdirected said jury (Trans. p. 190).

21. That the said District Court erred in charging and instructing the jury impanelled in said cause that:

> "As to the defendants Ralph K. Blair and Thomas Addis, you will return a verdict of guilty upon the first count";

and therein misdirected said jury (Trans. p. 190).

22. That the said District Court erred in failing to charge and instruct the jury impanelled in said cause that the knowledge of either said Ralph K. Blair or said Thomas Addis, or both of them, of any criminal conspiracy or agreement, or purpose on the part of any other person or persons, without active co-operation by said Blair or Addis, or both of them, in such criminal conspiracy, agreement or purpose, would not be sufficient to authorize or justify any finding of guilty against either said Blair or said Addis, or both of them; and in failing so to instruct and charge said jury, said court misdirected said jury (Trans. pp. 190, 191).

23. That the said District Court erred in failing to instruct and direct said jury that not merely the bare acts of said defendants and/or of each of them, were to be considered, but also the intention and purpose of said defendants, and/or of each of them, in doing any act or acts referred to in the agreed statement of facts on file herein should also be considered; and in failing so to instruct and charge said jury, said court misdirected said jury (Trans. p. 191).

24. Said District Court erred in failing to instruct and direct said jury that the intention and purpose of said defendants, and of each of them, in doing any

act or acts mentioned in the agreed statement of facts on file herein were material to the issue which was then before said jury; and that unless said jury were satisfied beyond all reasonable doubt that said intention and purpose of said defendants, and/or of either of them, in acting as shown in the agreed statement of facts on file herein, were criminal, and that they or either of them, did such acts with the intention to violate the law, and did those acts with that object, then said jury could not and should not find said defendants, or either of them, guilty of any offense under the indictment herein, or either count thereof; and in failing so to instruct and charge said jury, said court misdirected said jury (Trans. p. 191).

25. That the said District Court erred in failing to instruct and direct said jury that before said defendants, or either of them could be convicted under the indictment, or any count thereof, the facts stated in the agreed statement of facts on file herein must be of such a character as to exclude every reasonable hypothesis but that of the defendant's or defendants' guilt of the offense charged in said indictment, or in either count thereof; and in failing so to instruct and charge said jury, said court misdirected said jury (Trans. p. 192).

26. That said District Court erred in failing to instruct and direct said jury that if all the facts stated in the agreed statement of facts on file herein taken together are as compatible with innocence as with guilt, there arises a reasonable doubt requiring the acquittal of said defendants, or of each of them, of any and all

offenses referred to in the indictment herein, or in either count thereof; and in failing so to instruct and charge said jury, said court misdirected said jury (Trans. p. 192).

27. That said District Court erred in failing to instruct and direct said jury that his Majesty the King of Great Britain and Ireland was at all the times in the agreed statement of facts mentioned, desirous of the return to Great Britain of British subjects for employment in the army and navy, and in the various branches of the national service of all kinds; and in failing further to instruct and charge said jury that if the facts stated in said agreed statement of facts, taken together, were or are as compatible with the assisting or transporting to Great Britain of British subjects for employment in the various branches of the national service of all kinds, as they were with the hypothesis that such subjects were hired and retained for employment or enlistment in the army or navy of Great Britain, that then neither said defendants, nor either of them, could be convicted of any offense charged in the indictment herein, or in either count thereof, and in failing so further to charge said jury, said court misdirected said jury (Trans. pp. 192, 193).

28. That said District Court erred in failing to instruct and direct said jury that the acts and conduct of said defendants, and of each of them, as stated in the agreed statement of facts on file herein was and is entirely as consistent with the assisting and transporting to Great Britain of British subjects, sound in body and limb, for employment in the various branches of

the national service of all kinds, as they were or are with any other theory or hypothesis; and in failing further to instruct and charge said jury that where in a given cause there are two theories or hypotheses open by which the agreed facts may be explained, one in favor of innocence, and the other in favor of a criminal course, the one in favor of innocence must be accepted and must prevail; and in failing further to charge and instruct said jury that if the acts and conduct of the defendants, and of each of them, as stated in the agreed statements of facts on file herein, were as consistent with the hypothesis of assisting and transporting to Great Britain of British subjects, sound in body and limb, for employment in the various branches of the national service of all kinds, as they were with the hypothesis that such British subjects were assisted and transported to Great Britain for employment in the army and navy, then that said jury could not convict said defendants, or either of them, under said indictment or either of the counts thereof, but must acquit them and each of them; and in failing so further to charge said jury, said court misdirected said jury (Trans. pp. 193, 194).

29. That said District Court erred in failing to instruct and direct said jury that the acts and conduct of the defendants, and each of them, stated in the agreed statement of facts, were and are explainable upon an hypothesis arising upon the face of the agreed statement of facts herein, and consistent with innocence, namely, the hypothesis that the defendants either together or separately, assisted the return to Great Britain of British subjects, sound in body and limb for employ-

ment in the various branches of the national service of all kinds; and in failing so to instruct and charge said jury, said court misdirected said jury (Trans. p. 194).

30. That said District Court erred in its instruction and charge to the jury impanelled in said cause by adopting in said instruction and charge, and presenting the same to said jury, an interpretation of said agreed statement of facts, and a theory of the case, in favor of the guilt rather than in favor of the innocence of said defendants, and/or each of them; and in failing to instruct and charge said jury to adopt such an interpretation of said agreed statement of facts, and such a theory of this cause as would be in favor of the innocence rather than in favor of the guilt of said defendants, and/or either of them, said court misdirected said jury (Trans. p. 194).

31. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects, sound in body and limb, for employment in the various branches of the national service of all kinds, and in failing so further to charge said jury, said court misdirected said jury (Trans. p. 195).

32. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States to aid or assist, financially or otherwise, the return to Great Britain of British subjects, sound in body and limb, when such assistance,

whether financial or otherwise, is given to such British subjects who voluntarily present themselves and ask for assistance without disclosing their intention, and to whom assistance is given without imposing any obligation upon them to enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman; and in failing so further to charge said jury, said court misdirected said jury (Trans. p. 195).

33. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects, sound in body and limb, where such assistance is given by persons who supposed, believed and presumed that such British subjects would enlist in the military or naval service of Great Britain, and where it was the individual intent of a majority of such British subjects so assisted to enlist in such service; and in failing so further to charge said jury said court misdirected said jury (Trans. pp. 195, 196).

34. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects, sound in body and limb, even though those furnishing such assistance, supposed, believed and presumed that such British subjects, so assisted, would enlist in the military or naval service of Great Britain, and even though it was the individual

intent of a majority of such British subjects, so assisted, to enlist in such service, where no obligation was imposed upon such British subjects, or upon any of them, to enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman, and where no obligation was put upon the British subjects, so assisted, to go beyond the limits or jurisdiction of the United States with the intent so to enlist; and in failing so further to charge said jury said court misdirected said jury (Trans. p. 196).

35. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects, sound in body and limb, even though those furnishing such assistance, supposed, believed and presumed that such subjects, so aided and assisted, would enlist in the military or naval service of Great Britain, and even though it was the individual intent of a majority of such British subjects, so aided and assisted, to enlist in such service, unless there was, not only an obligation upon such British subjects, so aided and assisted, to enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman, or an obligation upon such British subjects to go beyond the limits or jurisdiction of the United States with the intent so to enlist, but also that there was an actual engagement entered into between the persons giving such aid or assistance, and the British subjects so aided and assisted whereby such British subjects so aided and assisted

should enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman, or should go beyond the limits or jurisdiction of the United States with the intent so to enlist, such engagement being with the consent and understanding of both parties to such engagement; and in failing so further to charge said jury said court misdirected said jury (Trans. pp. 196, 197).

36. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States for individuals to go beyond the limits or jurisdiction of the United States with intent to enlist in foreign miltary service; and in failing so further to charge said jury said court misdirected said jury (Trans. pp. 197, 198).

37. That the said District Court erred in failing to instruct and charge the jury impanelled in said cause that it was and is no crime or offense against any of the laws of the United States to transport persons out or beyond the limits or jurisdiction of the United States and to land them in foreign countries when such persons had an intent to enlist in foreign armies; and in failing so further to charge said jury said court misdirected said jury (Trans. p. 198).

38. That the said District Court erred in permitting to be rendered, and in receiving the verdict of the jury herein in so far as said verdict found these defendants guilty under the first count in the indictment herein contained (Trans. p. 198).

39. That the said District Court erred in overruling and denying the motion of these defendants for a new trial of the above entitled action, and in not allowing the same for the reasons and grounds in said motion taken and assigned (Trans. p. 198).

40. That the said District Court erred in overruling and denying the motion of these defendants in arrest of judgment herein upon the grounds and reasons in said motion taken and assigned (Trans. p. 198).

41. That the said District Court erred in making, giving, rendering, entering and filing judgment herein against these defendants, and/or each of them, on the first count of the indictment herein for the reason that neither said indictment nor said first count thereof states any crime or offense against any law of the United States, for the reasons, and each of them, taken and assigned by these defendants in their demurrers to said indictment, and to said first count thereof (Trans. pp. 198, 199).

42. That the said District Court erred in sentencing these defendants, and/or each of them without their first being adjudged, and/or each of them first being adjudged guilty of any crime or offense against any law of the United States (Trans. p. 199).

43. That the said District Court erred in giving, making, rendering, entering and filing its judgment in the above entitled cause in favor of the United States of America and against these defendants, and/or each of them (Trans. p. 199).

44. That the said District Court erred in not giving, making, rendering, entering and filing its final judgment in the above entitled cause in favor of these defendants and each of them, and against the United States of America (Trans. p. 199).

45. That the said District Court erred in giving, making, rendering, entering and filing its final judgment in the above entitled action in favor of the United States of America and against these defendants, and/or each of them upon the pleadings and record in said action (Trans. p. 199).

46. That the said District Court erred in giving, making, rendering, entering and filing its final judgment in said action in favor of the United States of America and against these defendants, and/or each of them, in this, that said final judgment was and is contrary to law and to the case made and facts stated in the pleadings, "agreed statement of facts", and record in said action (Trans. pp. 199, 200).

47. That the said District Court erred in pronouncing sentence against these defendants, and/or each of them (Trans. p. 200).

Argument.

THE STATUTES INVOLVED.

The history of legislation restricting the right of foreign enlistment shows that such legislation has always presupposed and recognized that right; that such legislation has not been inspired by any definite theory of neutrality, has usually been a makeshift expedient without system, logic or principle, has frequently been temporary in time and purpose, and has always been restricted in scope; that such legislation has always contemplated contractual relations as the basis of foreign enlistment; that such legislation has created no international, but only an ordinary municipal, offense; and that such offense, so created, is not to be treated otherwise than or differently from any other municipal offense, either because the prosecutor may happen to be the United States, or because of any political consideration. In view of these circumstances, and of the general rule as to the construction of penal statutes, the sections involved in this cause should not be so construed as in any way to enlarge their scope or to include within their purview any conduct not plainly and unmistakably within their actual terms.

The statutes involved in this cause are Sections 10 and 37 of the Federal Penal Code. Section 37 is the familiar statute dealing with the general subject matter of conspiracy. Section 10 is part of that chapter of the code which deals with offenses against neutrality: it is one of a series of provisions dealing with the same subject matter from diverse points of view: it

> "is not to be isolated from the great body of law of which it forms a part; on the contrary, it is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes".
>
> *Wilson v. Donaldson,* 10 A. S. R. 48, 49; 117 Ind. 356.

It is, indeed, a rule of statutory construction very generally recognized that a statute must be construed with reference to the whole system of which it forms a part, and that all consistent statutes which can stand together, even though enacted at different dates are treated and construed together, as though they constituted one act. This principle is recognized in such cases as *U. S. v. Saunders,* 89 U. S. (22 Wall.) 492; *U. S. v. Farden,* 99 id. 10; *Viterbo v. Friedlander,* 120 id. 707—even repealed statutes on the same subject matter may be considered in construing provisions that remain in force; *U. S. v. Freeman,* 44 U. S. (3 How.) 556; *U. S. v. Babbit,* 66 U. S. (1 Black), 55; *Vane v. Newcome,* 132 id. 220; *Aldridge v. Williams,* 44 id. (3 How.) 9.

It is the view of Sutherland that such statutes are to be taken together and construed as one system (Stat. Const. Sec. 288), and the rule has a very wide application, having been applied to such varying topics as revenue statutes (*Noble v. State,* 1 Green, (Iowa) 325, 330), and the revenue laws of the United States (*Pennington v. Cox,* 6 U. S. (2 Cranch) 33; *U. S. v. Collier* (3 Blatchf. 333),) and the acts as to soldiers' bounty (*Philbrook v. U. S.,* 8 Ct. of Cl. 523), and laws as to public lands (act of relief 2 Ops. Atty. Genl. 46) and code provisions as to railroads (*Mobile, etc. Ry. v. Malone,* 46 Ala. 391), and acts relating to the sale of infants' estates *(Bolgiana v. Cook,* 19 Md. 392; *Billingslea v. Baldwin,* 23 id. 106), and statutes in relation to attachments against watercraft (*Wallace v. Seals,* 36 Miss. 53), and acts relating to public improvements *(State*

v. Clark, 54 Mo. 216), and acts relating to the protection of married women in their estates (*Perkins v. Perkins,* 62 Barber (N. Y.), 531), and finally, not to multiply illustrations, the various sections of a code referring to the same subject matter (*Mitchell v. Long,* 74 Ga. 96; *State v. Boswell,* 104 Ind. 547; *Moriarity v. Central Iowa Ry.,* 64 Iowa 700; *Stidhan v. Symmes,* 74 Ga. 187; *Depas v. Reez,* 2 La. Anual 30; *Burger v. Frakes,* 67 Iowa 467; *St. Joseph v. Porter,* 29 Mo. App. 605; *Hunt v. Farmers Ins. Co.,* 67 Iowa, 742; *Childers v. Johnson,* 6 La. Ann. 638; *Gibbons v. Brittenum,* 56 Miss. 251; *Roberts v. Briscoe,* 44 Ohio St. 600).

(A)—SECTION 10.

(a) *History.* The history of this as of any other statute is of paramount importance as illustrative of the intent, purpose and policy of the legislature, and as aiding in the proper understanding and construction of the enactment. As remarked by the Court of Appeals of New York,

> "The occasion of the enactment of a law may always be referred to in interpreting and giving effect to it."
>
> *The People v. Supervisors,* 43 N. Y. 130, 132,

and as pointed out by the Supreme Court;

> "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."
>
> *U. S. v. U. P. Railroad,* 91 U. S. 72, 79.

Hence, whenever light can be derived from such sources, the courts will take judicial notice of the facts of contemporary history, the prior state of the law, the particular abuse or defect which the act was meant to remedy, and the application to such state of affairs of the language which the act employs; and they will also, for this purpose, inform themselves as to such facts and circumstances by any and all available means. Thus, while the courts cannot recur to the views of the individual members of the legislative body expressed in debate on the act, yet they may advise themselves as to the history of the times and the general state of public, judicial and legislative opinion at that period (*U. S. v. Oregon, etc. Railway,* 57 Fed. 426). For example, in the interpretation of the alien contract labor law, the Supreme Court held that it was justified in looking into contemporaneous events, including the situation, as it existed, and as it was pressed upon the attention of Congress, while the act was under consideration; and to this end, it considered not only the general historic condition of the times, as showing the abuse against which the statute was directed, but also the petitions presented to Congress asking for the enactment of such a law, the testimony given before the Congressional committees, and the reports of those committees to their respective houses (*Rector of Holy Trinity Church v. U. S.,* 143 U. S. 457). There can, indeed, be no reasonable doubt as to the rule that in the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, the

endeavor being, by tracing the history of legislation on the subject, to ascertain the purpose of the legislature, or to discover how the policy of the legislature with reference to the subject matter has been changed or modified from time to time; and with this purpose in view it is proper to consider even those statutes which have been repealed *(Peoples Bank v. Goodwin,* 162 Fed. 937; *So. Railway Company v. McNeill,* 155 id. 756). Bearing in mind this general principle, let us look for a brief space at the history of the legislation now under consideration.

England. Section 10 of the Federal Penal Code had its origin in England—in the mother country whence so many of our political, and legal conceptions have been derived. Prior to any restrictive Parliamentary enactment, no one questioned the right of any man to fight where he pleased. No one disputed the inherent right of national self-defense: but as the "eminently judicial" Hallam, as Macaulay calls him, points out,

> "the feudal military tenures had superseded that earlier system of public defense which called upon every man, and especially every landholder, to protect his country", and "this was the revolution of the Ninth Century".
>
> *1 Hallam, State of Europe,* London Edition, 1878, pp. 253-4.

As Hallam makes clear,

> "the nature of feudal obligation was far better adapted to the partial quarrels of neighboring lords than to the wars of Kingdoms. Customs, founded upon the poverty of the smaller gentry, had limited their martial duties to a period never exceeding forty days, and diminished

> according to the subdivisions of the fief. They could undertake an expedition, but not a campaign; they could burn an open town, but had seldom leisure to besiege a fortress. Hence, when the Kings of France and England were engaged in wars, which, on our side at least, might be termed national, the insufficiency of the feudal militia became evident".
>
> *Id.*, p. 262.

Is it, then, a matter of any surprise, that in an age which placed no restrictions upon the right of a man to fight where he pleased, a new period in the military history of Europe should be inaugurated, whereby, to adopt Hallam's language again, "Mercenary troops were substituted for the feudal militia" (id. 264)? At this time, in the twelfth and thirteenth centuries, so far as our researches authorize us to make the statement, no statute existed which denied or qualified in any way the right of foreign enlistment; and this very fact of the employment of mercenaries was in itself a recognition of the right to foreign enlistment, which accorded with and was an inseparable adjunct of the right of every free man, in the absence of a restraining statute, to fight where he pleased. As Mr. Justice Stephen sums the matter up:

> "I am not aware of any evidence to show that till modern times the act of taking part in foreign hostilities was regarded as criminal unless the act involved some breach of duty towards the King. Indeed, the whole spirit of the feudal system was favorable to the notion that it was right and natural for soldiers to seek service wherever they could find it. The case of the Free Companies which ranged all over Europe in the latter part of the fourteenth and early in the fifteenth century is well known, and Froissart is full of such stories. At a later time, and especially through the wars of the sixteenth

and seventeenth centuries, all countries had mercenary troops in their service, and there is abundant proof that large members of English, Scotch and Irish took part, without being supposed to do anything objectionable, legally or morally, in the wars then in progress. There were, for instance, a large number of British, and especially of Scotch, troops in the army of Gustavus Adolphus."

3 Hist. Cr. Law of England, London Ed. 1883, pp. 257-8.

This general right, antecedent to all restrictive statutes, of persons to seek military service where they pleased, subsequently became a matter of legislative attention. As Mr. Justice Stephen remarks:

"The first occasion on which parliament recognized and interfered with such practices was in the year 1605, when was passed 3 Jas. 1, c. 4, 'An Act for the better discovery and repressing of Popish recusants' (Appendix Three). This was one of the most severe acts ever passed against the Roman Catholics, and was one of several statutes produced by the excitement caused by the gunpowder treason. The eighteenth section begins by a recital that it is found 'by late experience that such as go voluntarily out of this realm of England to serve foreign princes, states or potentates are for the most part perverted in their religion and loyalty by Jesuits and fugitives with whom they had most converse'. It went on to enact that everyone who should go out of the realm to serve any foreign prince, state or potentate, should be a felon, unless he first took the oath of obedience—an elaborate test provided by the act for many purposes—and entered into a bond not to be reconciled to the Pope, or plot against the King, but to reveal to him any conspiracies which might come to his knowledge. This statute assumes that to take foreign service is in itself lawful, though it attaches conditions to it which were at that time considered necessary."

Id., p. 258.

Then came the legislation of Anne—legislation which had its roots in the reign of James II: James II came to the throne in 1685. He was possessed of two great ambitions, the first of which was to rule the country independently of Parliament, and the second of which was to restore the Roman Catholic religion in England; and the obstinate folly with which he sought to accomplish these purposes made enemies of all classes and turned the whole country against him. Up to the year 1688, the succession to the throne after James rested with his two daughters—Mary, who had married William, Prince of Orange, President of the Dutch Republic, and resided in Holland; and her younger sister, Anne, who had married George, Prince of Denmark, and was then living in London. Both of these daughters were zealous Protestants, and the expectation that one of them would receive the English crown at the King's death, had kept the people quiet while James was endeavoring to restore Catholicism. But in 1688 the alarming intelligence had been spread that a son had been born to the King—alarming because, if true, this son would now be the next heir to the crown, and would be educated and come into power as a Catholic; and this prospect brought matters to a crisis. Many persons regarded the alleged birth as an imposition, it being reported that the child was not the true son of the King and Queen, but a child that had been smuggled into the palace to deceive the nation: but apparently there was no real foundation for this view. The crisis resulted, however, in an invitation to William to come over to defend Mary's claim to the throne and to insure

"the restoration of English liberties and the protection of the Protestant religion." William accepted this invitation. James was deserted by everyone, even by Anne; and the bloodless revolution of 1688 was accomplished, leaving no reasonable doubt that Mary would receive the English crown. In the meantime, James' Queen (subsequently followed by James himself) had fled to France, taking with her her infant son, the unfortunate Prince James Edward, whose birth had caused the revolution. Instead of a Kingdom, he had inherited nothing but the sobriquet of "Pretender", which he in turn transmitted to his son, Prince James Edward Stuart being the so-called "Old Pretender", and his son, Prince Charles Edward Stuart being the so-called "Young Pretender". After the flight of James, William and Mary reigned until 1702, when Anne came to the throne. Shortly before the death of William, James died: thereupon Louis XIV publicly acknowledged the exile's son as the rightful Sovereign of England, Scotland and Ireland; and this precipitated the war with France, which, since it had really originally grown out of Louis' designs on the crown of Spain, came to be called the War of Spanish Succession. As this war progressed, England came to have three objects at stake—the maintenance of Protestant government at home; the maintenance of the Protestant power of Holland; and the retention of a large part of the American Continent: but the contest was begun by England mainly to prevent the French King from carrying out his threat to place the Pretender on the English throne, and so overturn the Bill of Rights and Act of Settlement,

and thereby restore the country to the Roman Catholic Stuarts. This brief historical reference will assist in the understanding of the legislation of Anne.

The Pretender was not without active adherents in England, and their activity instigated the passage of two Acts by Parliament in 1708, one of which provided for the temporary suspension of the writ of habeas corpus, and the other authorized any Justice of the Peace to administer to any subject a test oath abjuring the Pretender. Later, in 1713, an Act on the subject of foreign enlistment was adopted, the occasion and purpose of which are sufficiently apparent from the preamble:

> "Whereas, several ill affected persons, subjects of the crown of Great Britain, had lately in open defiance of the laws presumed traitorously to list divers of her Majesty's subjects within the Kingdoms of Great Britain and Ireland to serve the person pretended to be the Prince of Wales during the life of the late King James II, and since his decease pretending to be and taking upon himself the style and title of King of England by the name of James III as soldiers, to the great disturbance to the peace of these, her Majesty's Kingdoms; and whereas; the like traitorous practice may be more covertly carried on under pretense of listing her Majesty's subjects to serve as soldiers under some foreign prince, state or potentate, for remedy thereof, be it enacted, etc."

This Act (Appendix Four) provided that if any subject of the crown should within the Kingdom of Great Britain and Ireland procure any person being a subject to list or enter himself, or hire or retain any person being a subject with an intent to cause such person to list or enter himself, or procure any person being a subject to go beyond the seas or embark with intent

and in order to be listed to serve any foreign Prince, as a soldier, without leave or license of her Majesty, every such person so offending shall be taken, deemed and adjudged to be guilty of high treason. This Act was purely temporary in character, being continued in force for three years only after August 1, 1713, and to the end of the next Parliament. It was, by its plain terms, restricted in its operation to the subjects of the Queen, and had no applicability to aliens. It punished three separate classes of Acts, the first of which was very broad and far-reaching in its scope, viz: (1) The procuring any subject to list or enter himself to serve a foreign Prince as a soldier without leave or license of her Majesty; (2) the hiring or retaining of a subject with intent to cause such subject to list or enter himself to serve any foreign Prince as a soldier without leave or license of her Majesty; and (3) the procuring any subject to go beyond the seas or embark with intent and in order to be listed to serve any foreign Prince as a soldier without leave or license of her Majesty. And it is finally to be observed of this legislation that, to adopt the language of Mr. Justice Stephen it assumes that to take foreign service is in itself lawful, though the statute attaches conditions to it which were at that time considered necessary. It will be perceived that this Act was occasioned by and served a temporary purpose: that it was not the offspring of any distinct or definite theory of neutrality: that it made no real denial of the right of a soldier to seek service where he pleased; and that, at the most, it was merely restrictive of the conceded right to seek service beyond the

seas or under some foreign Prince. Then came the legislation of George II, and speaking of this legislation, Mr. Justice Stephen remarks:

> "In 1736, an Act was passed (9 George II, c. 30) which made it a felony without benefit of clergy to enlist, or procure any person to go abroad to enlist, in the service of any foreign Prince, State or Potentate as a Sovereign. In 1756, an Act was passed (29 George II, c. 17) which somewhat enlarged the terms of the Act of 1736, in order to bring within it practices by which it had been evaded. It also specifically enacted in addition that it should be felony without benefit of clergy to 'enter into the military service of the French King'. In the debate in the Foreign Enlistment Act of 1819, Sir James McIntosh said 'These acts were merely intended to prevent the formation of Jacobite armies in France and Spain.' It was also asserted by Sir Robert Wilson that the Acts 'remained during all times a dead letter on the statute book'. He stated that prisoners taken from the Irish Brigade at Fontenoy, Dettingen, Minden and Colloden were treated not as criminals, but as prisoners of war. He also said 'at one period, out of one hundred and twenty companies of Austrian Grenadiers, seventy were commanded by Irish officers, and that when the officers of the Irish Brigade refused to serve the republic after the revolution, they were received into the British service, and five or six regiments were embodied and put under their command. In short, down to the end of the eighteenth century, it was not in practice considered improper for persons who were so disposed to seek military service where they pleased, and writers on International Law maintained that neutral nations were under no obligation to belligerents to prevent neutral subjects from engaging in the service of either belligerent as they might feel disposed."
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> *3 Hist. Cr. Law of England,* London Ed. 1883, pp. 258-9.

It is, moreover, to be observed concerning this legislation of George II that the original Act of 1736 (Ap-

pendix Five) was very similar to the Statute of Anne, with the difference, however, that while the Act of Anne applied solely to the enlistment of British subjects by British subjects, the Act of 1736 somewhat enlarged the scope of the Act of Anne by applying to the enlistment of British subjects by any person, whether British subjects or not.

In 1756 another British statute was passed, 29 Geo. II, c. 17 (Appendix Six) to supplement the statute of 9 Geo. II, c. 30. This supplementary statute had a double purpose. Some question having been raised whether the actual payment and receipt of enlistment money in England was necessary to an enlisting under the earlier statute, the statute of 1756 was passed for the one purpose therein expressed "of removing the said doubt", and for the further purpose therein expressed of "the more effectually preventing a practice (foreign enlistment) so highly detrimental to this Kingdom" (29 Geo. II, c. 30, Sec. IV).

While the British statute of 1736 prohibited British subjects from enlisting or entering themselves in foreign service, either within or without the realm, it is evident that some questions were being raised whether the other acts prohibited would constitute offenses if not committed within the realm. References to the lack of any necessity for the payment and receipt of enlistment money are therefore frequent throughout Section IV of this supplementary Act of 1756, and the doubt is removed by creating new offenses which are therefore defined. Thus, for the first time it was then made an offense for any British subject to "engage, contract

or agree within the Kingdom of Great Britain and Ireland to go beyond the seas or embark with an intent and in order to enlist and enter himself to serve as a soldier in any foreign service'' without leave or license of His Majesty (Sec. IV). And it was then also made an offense for the first time in Section IV for any person to ''hire, retain, engage or procure any subject of His Majesty * * * to agree to go beyond the seas or embark with an intent and in order to be enlisted to serve any foreign Prince, state or potentate as a soldier, without leave or license of His Majesty''. (This same statute also prohibited the acceptance of commissions as officers in foreign services.) Where before the British statute of 1756 it was an offense to procure a British subject to go beyond the seas or embark with the interdicted intent, in which an actual going or embarking was essential to constitute the offense, under the statute of 1756 it was sufficient to hire, retain, engage or procure a British subject to agree to go or embark, and the offense was complete whether the subject went or embarked as agreed, or not.

Here again, we observe that this legislation was not the product of any real advance in international conceptions of neutrality, that it was occasioned by and served a temporary purpose, and that it assumed that to take foreign service was not an act in itself necessarily unlawful, although the legislature did attach conditions thereto which in the opinion of the legislature were regarded at that time as necessary. It will be observed, moreover, that all of the legislation upon these matters up to and including 1756 had been adopted

prior to the acquisition of independence by the American colonies from the British crown; and it cannot be assumed that this legislation was unknown to colonial lawyers and public men.

The next enactment of the British legislature upon this subject was that of 59 George III, c. 69 (Appendix Seven).

This Act of 59 George III, c. 69, was passed in 1819, to restrain outbursts of sympathy with the revolt of Spain's South American Colonies against her, and it was modeled upon the United States Statute of 1818, concerning which more will be said hereafter. During the American Civil War, this British Act of 1819, proved insufficient to prevent traffic between English ship builders and the Confederate government; and it was accordingly replaced in 1870 (33 and 34 Vict. c. 90), by a more stringent enactment; and so far as relevant here, this Act of 1870 prohibits the enlisting of one's self and others—without a license from the crown—for service under a foreign state which is at war with a state that is at peace with England, and declares in Section 13, a violation to be a misdemeanor punishable with a fine and with an imprisonment for a period not exceeding two years, with or without hard labor.

The Act of 59 Geo. III, in its first section repeals the legislation of George II, and then, in its second section, deals with the subject matter most relevant here. This second section deals with two classes of persons, "any natural born subject of His Majesty", and "any person whatever": it makes no pretense of forbidding foreign enlistment absolutely, but only when

done without "the Leave or License of His Majesty": it associates the terms "engage, contract or agree to go"; and, when dealing with "any person whatever", it enlarges the scope of the enactment beyond a hiring or retaining, and employs the broader language "hire, retain, engage or procure". Plainly, foreign enlistment was regarded as entirely impeccable where "the Leave or License of His Majesty" was obtained; and equally plainly, the broad term "procure" would include acts and conduct which would not be included under the phrase "hire or retain".

Nor does the act now in force (The Foreign Enlistment Act, 1870; 33 & 34 Vict., c. 90) overlook the right of foreign enlistment for, here also, we find recurring the characteristic phrase "Without the license of Her Majesty". It extends the scope of the statute to "any person" who "*accepts or agrees to accept* any * * * engagement" in the service of the foreign state, and among other matters it also prohibits any person to "induce" any other person to quit or to go on board any ship with a view of quitting His Majesty's dominions, "with intent to accept any commission or engagement in the military or naval service" of a country at war with a friendly state.

The United States. During the struggle of the Colonials for independence, both sides utilized assisttance from other nations. Failing to secure mercenaries from Russia, the British made use of Hessians; they hired mercenaries from the lower Rhine provinces—Hesse, Waldeck and others; and while the practice of employing mercenaries was then cus-

tomary, yet, for the British ministry to use this method against their own kindred in America was looked upon with aversion by the majority of Englishmen, and aroused ungovernable indignation in all Americans: indeed, this conduct of the then incapable heads of the Admiralty and War Office exhibited a callousness toward all ties of blood and speech which rendered futile any hope of reconciliation. But, on the other hand, the Colonials accepted aid from such men as Lafayette, D'Estaing and others—men whose services were of the highest importance and value to the struggling Americans. The fact was that there were very few trained officers in America: the American military leaders generally were not so experienced as their antagonists, although Washington developed great strategic ability; and it was principally from the foreign soldiers who had enlisted in the Colonial cause that something of the military art was acquired. And not this only, but as early as the summer of 1776, French arms and munitions were being supplied to the Americans, notwithstanding that the French foreign minister solemnly assured the English Ambassador of the perfect neutrality of France. Not only were the munitions of war shipped, but sums of money were turned over to Benjamin Franklin, whose popularity at Paris actually rivalled that of Voltaire. And when the news of Burgoyne's surrender was brought to Paris, the French King made two treaties, one for commercial reciprocity, and the other a treaty of military alliance, recognizing the independence of the United States and pledging the countries to make no separate peace. And, indeed, it

was owing to the influence of the Marquis de Lafayette that thereafter a force of French soldiers under Rochambeau was sent to America. Finally, on September 3, 1783, peace was declared, and the independence of the colonies was recognized.

The first American statute upon the subject of neutrality was adopted on June 5, 1794; and, in addition to the fact that antecedent British cognate legislation—and certainly British legislation in force up to the separation between the two countries—was known to American judges, lawyers, legislators and public men through the medium of Hawkins' Pleas of the Crown, if not otherwise, this statute of itself furnishes convincing internal evidence that it was drafted with an eye upon the antecedent cognate legislation of the mother country. This statute grew out of the Franco-British war of 1793, and was temporary in point of time, and limited in point of character and scope. It is not, perhaps, too much to say that the French Revolution—*fons et origo,* as it was, of many changes, political, legislative and otherwise—was, among other things, the proximate cause of this statute. The Revolution had attracted the attention of the whole civilized world; and the Kings of Europe in particular watched, with the utmost concern, the course of events in France. They regarded the cause of Louis XVI as their own. They reasoned that if the French people should be allowed to overturn the throne of their hereditary Sovereign, no one would any longer entertain respect for the divine right of Kings. Austria entering into an offensive and defensive alliance with Prussia; and this fact, together with the general

warlike preparations and attitude of Austria awakened the apprehensions of the revolutionists, and led the legislative assembly of France, on April 20, 1792, to declare war on Austria. A little later the allied armies of the Austrians and the Prussians crossed the frontiers of France, and thus was taken the first step in a series of wars which were destined to last nearly a quarter of a century, and in which France, almost single-handed, was to struggle against the leagued powers of Europe and to illustrate the miracles possible to genius and enthusiasm.

Then came the trial and execution of the King of France: he was brought before the bar of the Convention, and charged with having opposed the will of the people, and with having conspired with the enemies of France: he was found guilty: the sentence was immediate death; and on January 21, 1793, he was executed. These events—the declaration of war of the previous year and this regicide—awakened among all the old Monarchies of Europe the most bitter hostility against the French Revolutionists; and this regicide was, in particular, interpreted as a threat against all Kings. A coalition embracing Great Britain, Austria, Prussia and other states was formed to crush the republican movement; and armies aggregating more than a quarter of a million of men threatened France at once on every frontier.

During this war, the belligerents acted upon the theory that neutral territory had no rights which they were bound to respect; and the disregard of the belligerents for neutral territory received a marked illustration in

the conduct of M. Genet, the French Minister to the United States. He issued letters of marque to American merchantmen in order that they might cruize against British ships; and he also proceeded even so far as to set up prize courts in connection with the French consulates within the United States. This conduct naturally led to vigorous protests by the United States.

On April 22, 1793, in a Proclamation, President Washington said:

> "Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain and the United Netherlands of the one part and France on the other, and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the *belligerent powers:* I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid toward those powers respectively, and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition."
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> *1 Messages & Papers of the Presidents,* 156.

Thereafter, in his 5th annual address to Congress, on December 3, 1793, the President said:

> "Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, or usurp and exercise judicial authority within the United States, or where the penalties on violations of the law of nations may have been indistinctly marked, or are inadequate—these offenses cannot receive too early and close an attention, and require prompt and decisive remedies."
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> *1 M. & P.,* 139.

Thereafter, on December 5, 1793, in a special message, referring again to M. Genet, the President complains that,

> "It is with extreme concern I have to inform you that the proceedings of the person whom they (the French people) have unfortunately appointed their minister plenipotentiary here have breathed nothing of the friendly spirit of the nation which sent him. Their tendency, on the contrary, has been to involve us in war abroad and discord and anarchy at home."
>
> *1 M. & P.,* 146.

And finally, on January 20, 1794, in a further special message, he advises Congress of the expected recall of the over-energetic minister (*1 M. & P.,* 150).

These were the historical circumstances out of which our neutrality Acts arose: as the President suggested, it was the pending state of war that called for neutrality legislation; and it is in the light of this circumstance that the President's messages, and the ensuing legislation, should be considered.

On June 5, 1794, pursuant to the President's recommendations, Congress enacted its initial neutrality statute; this statute was temporary in time and limited in character, being intended merely to bridge over the pending war conditions; and yet that statute, together with the Acts of 1793, 1817 and 1818, became the basis of the neutrality practice of the United States; and this legislation was carried forward into the Revised Statutes, and subsequently, in 1909, into the present Federal Penal Code, which went into effect on January 1, 1910.

The Act of 1794, in Section 2, is the progenitor of Section 10 of the Federal Penal Code. As already

pointed out, this Act was temporary and transient in character, and its life was specifically limited to two years.

The legislative history of the American Neutrality Statutes shows not only that Section 10 of the Federal Penal Code is based on Section 2 of the Act of 1794 but also evidences that so far as the definition of offenses is concerned, the present statute has made no advance from the position assumed in 1794. The first American Neutrality Statute was the Act of 1794 (1 Stat. L., 381), adopted to continue in force for a brief period and expiring, by its own provisions, on March 3, 1797. Before this Act had run its term, it was extended for another temporary existence to March 3, 1799 by an Act of 1797 (1 Stat. L., 497). In the same year, the supplementary Neutrality Statute of 1797 was passed (1 Stat. L., 520), upon whose term no limit was placed. The Neutrality Statute of 1794 ceased to be operative March 3, 1799 but in the following year by an Act approved April 24, 1800 (2 Stat. L., 54) it was revived and extended, this time, without any limit to its term. Until 1818 the Neutrality Statute of 1794 and the supplementary Statute of 1797 constituted the American Neutrality Statutes. In 1817 a temporary Neutrality Statute was adopted (3 Stat. L., 370), to continue in force for two years, which was a practical re-enactment of Sections 3 and 4 of the Act of 1794 with certain minor changes and the addition of certain administrative features. In 1818, the original Act of 1794, the supplementary Act of 1797 and the temporary Act of 1817 were all codified into a single statute (3 Stat. L., 447). Except

for a few slight changes in phrasing, the Act of 1818 was simply a codification of these prior Acts which it expressly repealed. It is unnecessary to do more than refer to the later supplementary Act of 1838 (5 Stat. L., 212), as that Act had a life of only two years from the date of its approval, March 10, 1838, and simply provided administrative features for the enforcement of the Act of 1818. Upon the adoption of the Revised Statutes of the United States on June 22, 1874, the Neutrality Act of 1818 became Sections 5281 to 5291 inclusive of the Revised Statutes, forming the title "Neutrality". Section 5287, United States Revised Statutes, was amended in 1875 (18 Stat. L., 320) to supply an omission which had occurred in incorporating the Act of 1818 into the Revised Statutes. Section 5291, United States Revised Statutes, was amended in 1877 (19 Stat. L., 252) by changing the word "enlist" to "enlists". By the Act of March 4, 1909 (35 Stat. L., 1080) the "Neutrality" title of the Revised Statutes of the United States became with only slight verbal changes Chapter 2 of the Federal Penal Code, entitled "Offenses against Neutrality"; Section 5284, United States Revised Statutes, being alone omitted.

So far as the offenses are concerned, which are defined in the American Neutrality Statutes, the changes made in the various codifications of 1818, 1874 and 1909 are very few. By Section 1 of the Neutrality Statute of 1794, a citizen was prohibited from accepting and exercising a commission to serve a foreign government. The correlative Section in the codification of 1818, and in the subsequent codifications, limited this prohibition to

commissions to serve a foreign government against a government with whom the United States were at peace. In describing a foreign government in the Neutrality Statute of 1794 it was as a "foreign prince or state". In the codification of 1818 and in the subsequent codifications this phrase was extended to read "foreign prince, state, colony, district, or people". A similar change was all that was attempted by the temporary Act of 1817, so far as it defined offenses. The only important change in the definition of offenses is found in the supplementary Neutrality Statute of 1797. That Act however was modified and limited materially upon becoming Section 4 of the Act of 1818 and as so modified later became Section 5284 United States Revised Statutes without further change. The character of these changes is not pertinent however as they related to maritime offenses and as this Section 5284 of the Revised Statutes was entirely omitted from the Federal Penal Code and was expressly repealed by it (Sec. 341, Fed. Pen. Code). The Neutrality Statute of 1794, therefore, stands out as the foundation of our present Neutrality Statute, which is its copy, practically without change. A table comparing the scope of the various sections of the successive American Neutrality Statutes will be found Appendix One of this brief. So far as the present law defines offenses it is substantially the law of the Act of 1794. This is especially true of Section 10 Fed. Pen. C. A comparison of the corresponding sections of the successive Neutrality Acts upon which 10 Fed. Pen. C. is based (the section involved in this

case) will be found in Appendix Two of this brief, from which it will appear that for all purposes of this case the law of Section 10 Fed. Pen. C. today is as it was in 1794.

A comparison of 10 Federal Penal Code (Section 2 of the Act of 1794) with the British Acts of 1736 and 1756 on which it was modeled will show some interesting differences and will show what the American section *does not* mean:

The specific analysis which follows shows how far short the American statute falls of following its British statutory models, how where the British statutes not only prohibit "hiring and retaining", but "procuring" as well, thus covering a broader field, the American statute has always been limited to prohibiting the mercenary acts of "hiring or retaining" only. It shows how the later British statutes cover still broader fields of action, and how in the various codifications of the American statute no progress has been made and how the field of prohibited action in America remains in 1915 what it was made in 1794. It shows what the American statute does not mean, how it does not cover mere acts of aiding or assisting persons to go abroad with intent to enlist in foreign service. It shows what the American statute does mean and how it is confined to mercenary acts of hiring or retaining and that these acts involve the notion of a definite contract of hire, with a common intent, upon which the minds of the parties have met.

The American Statute (Act of 1794, Sec. 2; Act of 1818, Sec. 2; 5282 U. S. Rev. Stat., 10 Fed. Pen. C.)	The British Statute of 1736 (Act of 9, Geo. II, c. 30; Appendix 5)
I. makes it unlawful for any American citizen within the territory or jurisdiction of the United States	I. makes it unlawful for any British subject within the Kingdom of Great Britain and Ireland, *or without the same,*
(a) To enlist;	(a) To enlist;
(b) To enter himself;	(b) To enter himself;
(c) To hire or retain a citizen *or alien (except transient aliens)* to enlist;	(c) To hire or retain a British SUBJECT *with an intent to cause such person* to enlist;
(d) To hire or retain a citizen *or alien (except transient aliens)* to enter himself;	(d) To hire or retain a British SUBJECT *with an intent to cause such person* to enter himself;
(e)	(e) *To procure a British* SUBJECT *to enlist;*
(f)	(f) *To procure a British* SUBJECT *to enter himself;*
(g) To *hire or retain* a citizen *or alien (except transient aliens)* to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered	(g) *To procure* a British SUBJECT to go beyond the seas or embark with an intent *and in order* to be enlisted;
in the service of any foreign prince, state, (etc.) as a soldier *or as a marine or seaman on board of any vessel of war, letter of marque or privateer;*	to serve any foreign prince, state, (etc.) as a soldier. *without leave or license of His Majesty,* (etc.)
and	and
II. makes it unlawful for any alien within the territory or jurisdiction of the United States *(except transient aliens)*	II. makes it unlawful for any alien within the Kingdom of Great Britain and Ireland, or *without the same,*

(a) To enlist;	(a) .....
(b) To enter himself;	(b) .....
(c) To hire or retain a citizen *or alien (except transient aliens)* to enlist;	(c) To hire or retain a British SUBJECT *with an intent to cause such person* to enlist;
(d) To hire or retain a citizen *or alien (except transient aliens)* to enter himself;	(d) To hire or retain a British SUBJECT, *with an intent to cause such person* to enter himself;
(e)	(e) *To procure a British* SUBJECT *to enlist;*
(f)	(f) *To procure a British* SUBJECT *to enter himself;*
(g) To *hire or retain* a citizen *or alien (except transient aliens)* to go beyond the limits or jurisdiction of the United States with intent to be enlisted *or entered;*	(g) To *procure* a British SUBJECT to go beyond the seas or embark with an intent *and in order* to be enlisted;
in the service of any foreign prince, state, (etc.) as a soldier *or as a marine or seaman on board of any vessel of war, letter of marque or privateer.*	to serve any foreign prince, state, (etc.) as a soldier *without leave or license of His Majesty,* (etc.).

Note:

The *transient aliens* referred to are those mentioned in 18 Fed. Pen. C., 5291 U. S. Rev. Stat., Sec. 2 Act of 1818, and Sec. 2, Act of 1794.

It will be noted that where the American statute denies the right to enlist in foreign service to all *persons* (citizens or aliens) the British statute only denies this right to British *subjects;* that the American statute prohibits the hiring or retaining of any *person* (citizen or alien) to enlist in foreign service while

the British statute only prohibits the hiring or retaining of British *subjects*. It will also be noted that where the American statute prohibits the hiring or retaining of *persons* (citizens or aliens) to enlist or enter themselves in foreign service, the British statute prohibits the hiring or retaining of British *subjects with an intent to cause such subjects* to enlist or enter themselves in foreign service. Again where the American statute prohibits the *hiring or retaining* of *persons* (citizens or aliens) to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in foreign service, the British statute says nothing about *hiring or retaining,* but prohibits the *procuring* of British *subjects* to go beyond the seas or embark with an intent and *in order* to be enlisted in foreign service.

With what object did the Congress in copying the British statute modify its phraseology in the particulars noted? It is evident that the British statute of 9 George II was passed to hold British subjects to their true allegiance, just as were the British statutes of 13 Anne and 3 James I, and this is probably why the offenses defined had no territorial limit. It is clear that the American statute on the other hand was more concerned with the place where the offense was committed than with the persons involved, and this is why the offenses defined had a territorial limit and embraced all persons, aliens as well as citizens.

But why did the Congress define the offense in these words "hires or retains another person to enlist or enter himself", when the British statutory model used the words "hire or retain any person being a subject *with*

an intent to cause such person to enlist or enter himself''? There was a purpose to be served by omitting the phrase ''with an intent to cause such person''.

Now if A should directly hire or retain B. to enlist or enter himself in the military service of X, a foreign prince, it could with exactness be said that A had hired or retained B with an intent to cause B to enlist or enter himself in the military service of X. Therefore, the clause in the British statute is as far reaching as the clause in the American statute. But if it be said that A has hired or retained B with an intent to cause B to enlist or enter himself in the military service of X, a foreign prince, it does not follow that the transaction can be accurately characterized as a hiring or retaining by A of B to enlist or enter himself in the military service of X. To illustrate; suppose that in England A hired B, C and D etc., to serve on board a ship to make a trip to China, and thereafter, with these men aboard, the ship started on its way from a port in England and sailed to Calais where a Confederate officer came aboard, broke out the Confederate flag over the vessel and sought to enlist in the Confederate naval service the aforesaid B, C, D, etc. Suppose further that A had really hired these men for the express purpose of putting them in this position, where they could be incited to enlist in the Confederate service. Clearly in this supposed case A had hired or retained B, C, D, etc., with an intent to cause them to enlist or enter themselves in the Confederate naval service. But in the case supposed it could not be said that A had hired B, C, D, etc., to enlist or enter themselves in the Con-

federate naval service. (The case supposed is that reported in *The Queen v. Rumble,* 4 Fost. & Fin. 175, and is similar to that considered in *Regina v. Corbett,* 4 Fost. & Fin. 555, where the prosecutions were had under the later British statute of 1819, and sought in the language of that statute to establish a causing, or attempting to cause, the men to enlist in the Confederate service.)

One more point must be noted about these correlative clauses in the British and American statutes. Under the British statute, the party hiring need alone have the intent to cause the party to enlist who was hired, as for example in the case supposed above. But under the American statute both parties to the contract of hiring must agree upon the enlistment, for obviously, one could not be hired to enlist who had not agreed to enlist, and therefore, the intent must be common.

It is clear, therefore, that the British clause covers all cases embraced in the American clause and others in addition. The reason for the difference in these two clauses is apparent. The British statute was designed to hold British subjects to their true allegiance. This being its object it was immaterial where the subject might be seduced from his true allegiance. The British subject might be hired in England, but if the hiring were had there with an intent later to cause him to enlist abroad in the service of a foreign prince, the offense is complete. The British subject was not only prohibited from enlisting in foreign service at home or abroad but no person could seduce a British subject by any contract of hiring into a position outside the realm where the

intent of the party hiring to cause him to enlist in foreign service could be attempted or consummated.

So, too, the British statute not only prohibits hiring or retaining a British subject with an intent to cause him to enlist or enter himself in foreign service (a clause which covers every Act embraced in the American statute and more too), but goes still further and prohibits any person from procuring a British subject to enlist or enter himself in foreign service. The obvious purpose of this latter clause is to cover cases where there was no hiring or retaining. Or, approaching the analysis by another road, it is evident that to prohibit one to *procure* a British subject *to enlist* in foreign service would not cover that case at which the statute is also aimed when it prohibits a person to *hire or retain* a British subject *with an intent to cause such person to enlist* in foreign service. It could not be charged that a person had *procured* a British subject to enlist in foreign service until the subject had actually enlisted. But it could be charged that a person had *hired or retained* a British subject with an intent to cause him to enlist in foreign service, as soon as the contract of hiring or retaining had been entered, without regard to the successful satisfaction of the intent with which the contract was made. Enlistment is not necessary to make out the latter offense or even necessary as evidence of the intent, but it is an essential feature of the former offense.

The American statute is concerned with the locality where the offense is committed. An American citizen abroad can accept and exercise a commission or enlist

or enter himself in foreign service at his pleasure. The object of preserving American citizens to their true allegiance is not the purpose of the American statute.

Its purpose is to refuse American territory as the base on which contracts to hire or retain persons to enlist or enter into foreign service may be made. And, while the American statute prohibits in America the hiring or retaining of any person to enlist or enter himself in foreign service, it does not penalize the procuring in America of persons to enlist or enter themselves in foreign service. The offense of procuring a subject to enlist found in the British statute is entirely omitted from the American statute. Why this omission? It cannot have been purposeless, because "procure" is not only a term of much wider import than "hire" or "retain", but in the context has quite a different application.

"Procure" is defined in the *Century Dictionary* as follows:

> "(2) To bring about by care and pains; effect; contrive and effect; induce; cause: as, 'He procured a law to be passed'. (3) to obtain, as by request, loan, effort, labor or purchase; get; gain; come into possession of."

The other definitions given are obsolete.

Thus, if one were to hire or retain a legislator to pass a law he would be guilty of a moral wrong if not of a legal offense, but if by a mere request he procured a legislator to pass a law he would be guilty of neither legal nor moral wrong. The one who hired or retained the legislator to pass a law might be said to have procured him to do so, but one who had procured

a legislator to pass a law could not be said in every such case to have hired or retained him to do so. So where the purpose was to prevent British subjects from being drawn from their true allegiance, obviously the statute purposed to prohibit every means which might be used for that object. But the American statute, having a different purpose, the American Government being concerned with prohibiting certain conduct on its territory which it deemed offensive, being indifferent to those people on its shores, be they citizens or aliens, who might go abroad for the purpose of enlisting in foreign service, concluded to prohibit only the mercenary act of hiring or retaining on American soil. By the passage of this law the Congress in effect said to the people of America; "You cannot in America enlist or enter yourselves to serve a foreign prince, nevertheless you can in America procure any person to enlist or enter himself for foreign service by any means short of hiring or retaining him to do so, but the use of any mercenary means such as hiring or retaining here is denied to you."

The giving of bounties as an inducement to enlistment is no uncommon custom. In *"The British Army of Today"*, Capt. A. H. Atteridge says, referring to the army as it was known in the 18th Century:

> "Recruits were obtained by sending out officers and sergeants to enlist them, and a bounty was generally offered both to the recruit and to any of his friends who could bring him in, the sum thus paid varying according to the need of men and the state of the recruiting market. The recruiting sergeant beating his drum in the country town, treating the rustics freely to drink, telling them of the glories of war,

> and finally half persuading, half juggling them into taking the king's shilling, is a familiar figure in our older novels and dramas'' (page 13).

Referring to the time when Great Britain was at war with France, the time when the first American Neutrality Statute was passed, he says:

> ''It is no wonder that to provide a sufficient number of regulars Government had to offer bounties which at last rose to £30 a head, and even then there was a deficiency which was once more met by hiring German mercenaries'' (page 18).

Again, writing of the *War of the Crimea,* he says:

> ''But once more recourse had to be had to the system of paying large bounties for enlistment'' (page 24).

Bounties were also liberally used in the American Revolutionary War, being given both by the Continental Congress and by the Colonies (see *Upton's Military Policy of the United States,* pp. 21, 22). The Continental bounty of $20.00 was increased by some of the colonies in 1777 until it reached $86.66 (ibid 28). In 1778 the Continental bounty was increased to $30.00 (ibid 35). In 1779 the Continental bounty became $200.00 (ibid p. 40), and Virginia's bounty reached $750.00 (ibid 41). Bounties were given by towns and by individuals (ibid 41). In 1780 New Jersey's bounty in excess of the Continental bounty reached $1000.00 (ibid 48). Bounties were also used in the war with Great Britain in 1812-1814 by the Congress and by the States (ibid 107; 122). So too bounties were used during the Mexican War (ibid pp. 205, 206). And we are

familiar with the bounties given recruits during the American Civil War.

This method of recruiting was doubtless in mind when the Congress prohibited hiring and retaining. Being familiar with the necessity of offering bounties to secure soldiers for our own wars, the Congress may have believed that without bounties, that is without a pecuniarily attractive contract of hire, men would not be lured into foreign service in large enough numbers to prove seriously embarrassing to our neutrality. Enlistment or entry into foreign service on American soil was prohibited, but acts which fell short of actual enlistment or entry in foreign service, acts which looked only to subsequent actual enlistments were prohibited only when accomplished by hiring or retaining. As to conduct short of this, the Congress was indifferent. So long as actual enlistment was prohibited, conduct aiding or encouraging the recruitment of foreign service which did not take the mercenary form of hiring or retaining, was not likely to cause any international difficulty to the United States; and this was consistent with the position assumed in passing a statute which left the individual abroad free to enlist in foreign service, and the individual at home free to go abroad with intent to be so enlisted. Such freedom was to be expected of a nation whose growth was developed by the arrival of people from Europe on its shores who expatriated themselves to become Americans, and which, therefore, recognized that its own citizens had an equal right of expatriation.

Thus Jefferson referring to this right of expatriation said in 1793:

> "Our citizens are certainly free to divest themselves of that character by emigration and other acts manifesting their intention, and may then become subjects of another power, and free to do whatever the subjects of that power may do."
>
> *4 Jefferson's Works,* (Washington's Ed.) 37.

And Webster said in 1842:

> "The Government of the United States does not maintain, and never has maintained, the doctrine of the perpetuity of natural allegiance."
>
> *6 Webster's Works,* 454; *12 Writings and Speeches of Daniel Webster,* 128.

And the Congress in 1868 declared that

> "the right of expatriation is a natural and inherent right of all people".
>
> *15 U. S. Stat. L.,* 223; *U. S. Rev. Stat.,* 1999.

But whatever be the explanation, the fact is that the British statute, which prohibited hiring and retaining in terms of wider scope than the corresponding terms in the American statute, went further, and by making it an offense, to procure British subjects to enlist or enter themselves in foreign service, prohibited acts, from which all hiring and retaining might be absent, and, thus covered a group of actions, which the American statute ignored, as of no concern, and made lawful, by its failure to penalize them.

We now come to that particular clause in the American statute with which we are immediately concerned in the case at bar.

The American statute of 1794 made it unlawful for any person within the territory or jurisdiction of the United States to *hire or retain* a citizen or alien (except transient aliens) to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in foreign service.

The British statute of 1736 made it unlawful for any person to *procure* a British SUBJECT to go beyond the seas or embark, with an intent *and in order* to be enlisted in foreign service *without leave or license of His Majesty.*

Note, that while the British statute prohibited any person,

1. To procure a British SUBJECT to enlist or enter himself in foreign service, and

2. To hire or retain a British SUBJECT with an intent to cause such person to enlist or enter himself in foreign service;

when it is addressed to conduct involved in leaving the realm, it only prohibited any person,

3. To procure a British SUBJECT to go beyond the seas or embark with an intent and in order to be enlisted in foreign service,

and contained no express prohibition against hiring or retaining a British subject to go beyond the seas and embark with an intent and in order to be enlisted in foreign service.

Why is there no reference to hiring or retaining in this clause of the British statute? We submit the explanation which follows:

If A hired or retained B to go beyond the seas or embark with an intent and in order to be enlisted in foreign service, it could properly be charged against A that he had hired or retained B with an intent to cause B to enlist in foreign service. When questions of leaving the realm are concerned, therefore, it was unnecessary to prohibit a hiring or retaining, as the general prohibition was broad enough to include it. But if A merely successfully requested or persuaded B to go beyond the seas or embark with an intent and in order to enlist in foreign service, it could not be charged against him that he had hired or retained B with an intent to cause B to enlist in foreign service, because a mere request or persuasion falls short of a hiring or retaining; nor, unless B actually enlisted, could it be charged that A had procured B to enlist in foreign service. Therefore, to cover the cases of successful request or persuasion the statute made it unlawful for any person to procure a British subject to go beyond the seas or embark with an intent and in order to enlist in foreign service. This offense was completed when the British subject went beyond the seas or even embarked with the intent and in order to enlist in foreign service, and whether he actually so enlisted or not, was immaterial.

It is obvious that by using the word "procure" in this clause the British statute covered a number of cases that would not fall under the ban, were the words "hire or retain" used instead, for "procure" covers every case of "causing" or "inducing", by whatsoever means. But while this is true, it is equally obvious that

cases might occur that could neither be classified as "hiring or retaining" nor, under the broader term, "procuring". If a beggar asks money of a citizen for a cup of coffee, and the citizen yields to the request, he has to that extent aided and assisted the beggar, but it could not be said that the citizen had "hired or retained" the beggar to drink a cup of coffee, or that he had "procured" him to do so, even if the beggar actually drank the coffee. And this is so because "procure" implies not only a causal relation, but a fixed purpose on the part of the actor. Literally, "procure" means "To take care of, manage" *(Skeat's Etymological Dictionary);* or, as expressed in *Crabb's Synonyms,* "To procure * * * is to get the thing wanted or sought for". So Roget in his *Thesaurus* (615) lists "procure" under "Causes of Volition", and groups it as follows: "Persuade; prevail—with,—upon; procure, enlist, engage; invite, court". "Procure," therefore, denotes conduct more active and more concerned than a mere aid or assistance.

Under the British statute, therefore, if A merely aided or assisted B to go beyond the seas or embark with an intent to be enlisted in foreign service, it could not be charged that A had hired or retained B with an intent to cause B to enlist or enter himself in foreign service, because there was no contract of hire; neither could it be charged that A had procured B to go beyond the seas or embark with an intent to be enlisted in foreign service, because A's conduct was in no way the exciting cause of B's act, it was in no way the occasion of volition on B's part. But under the British law

if as a result of A's assistance B succeeded in getting away and actually enlisted in foreign service, then A could be charged with aiding and abetting in the commission of a crime because the statute made B's enlistment a penal offense.

The British statute of 9 Geo. II, c. 30 (1736) was well known to the American Bar in 1794. It was printed in *Hale's Pleas of the Crown,* then the only book on criminal law in America. The American statute of 1794, so far as Section 2 thereof (now 10 Federal Penal Code) is concerned, bears its own internal evidence of having been copied from the British model. The British statute of 29 Geo. II, c. 17 (1756) was also well known and Section 1 thereof, referring to foreign commissions, was the model on which Section 1 of the American Act of 1794 was built. The conclusion that the differences between the British and American statutes found in their respective phraseology were deliberate, cannot be avoided.

Under the British law, Statutes of 1736 and 1756, as it was known to the Congress in 1794, no person

1. Could *procure* a British SUBJECT to go beyond the seas or embark with an intent *and in order* to be enlisted in foreign service (9 Geo. II, c. 30), or,

2. Could hire, retain, *engage or procure* a British SUBJECT *to agree* to go beyond the seas or embark with the intent referred to (29 Geo. II, c. 17).

The American Congress in 1794 contented itself with providing that no person

1. Could *hire or retain* another PERSON to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in foreign service (Act 1794, sec. 2).

The *procuring to go,* found in the British statute of 1736 was rejected entirely in the American statute of 1794 (and in all subsequent statutes). A closer model is found in the British statute of 1756. Where the American copy of 1794 (and subsequent American statutes) declared of *hiring or retaining* a person to go, the British model of 1756 prohibited hiring, retaining, *engaging or procuring* a British subject *to agree* to go. Now the phrase "to hire, retain or engage one to agree to go" is the exact counterpart in every particular of the shorter phrase "to hire, retain or engage one to go". The one is as broad as the other. Were it not for the word "procure" in the British statute of 1756, the other words "to agree" would have been unnecessary. For whether the party hired actually goes or not, if A has hired B to agree to go he has hired him to go. But A cannot be said to have procured B to go, unless B actually goes. But to charge A with having procured B to agree to go, it is immaterial whether B went or not, so long as he actually agreed to go. The omission of "engage" from the American statute is not particularly significant, as its connotation is closely allied to that of "hire" and "retain", though "engage" implies a less binding obligation than "hire" or "retain". But the omission from the American statute of such a word as "procure" with its much wider

scope and significance than "hire or retain", indicates a deliberate legislative intent, the more striking as it was formed with a model before the Congress which contained the word omitted.

Had the American Congress desired not only to prohibit the hiring or retaining of men to go abroad with the intent to be enlisted, but had desired to go further and prohibit other acts in connection with the going of men abroad for foreign enlistment, they could easily have accomplished the further purpose by adopting the phraseology of the British statutes. Had they desired to cover acts of aid or assistance they could have done so by adding the words found in Section 13 of the Federal Penal Code (Section 5, Act of 1794; Section 6, Act of 1818; 5286 U. S. Revised Statutes) to the words found in Section 10 of the Federal Penal Code (Sec. 2, Act of 1794; Sec. 2, Act of 1818; 5282 U. S. Revised Statutes). Section 13 of the Federal Penal Code reads:

> "Whoever within the territory or jurisdiction of the United States begins or sets on foot *or provides or prepares the means for* any military expedition or enterprise to be carried on from thence against the territory, etc., of any foreign prince, etc."

By including the words, underlined in Section 13, in an appropriate position in Section 10, that section would then read:

> "Whoever, etc., hires or retains *or provides or prepares the means for* another person to enlist or enter himself or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, etc."

But the omission of such words as "provides or prepares the means for" from Section 10 of the Federal Penal Code, and the omission therefrom of such words as are found in the British statutes, plainly indicates that mere acts of aid or assistance, request, urging or persuading, were not intended to be penalized by the Congress.

Having no intention of saying to individuals in America as the British Parliament had said to British subjects in the British dominions, that they were not free to leave the country at any time and enter into foreign service (provided they did not go in the form of a military expedition), the Congress in 1794 was quite satisfied to view with indifference any who might aid, assist, request or even persuade citizens or aliens to go abroad with intent to be enlisted in foreign service, provided there was no hiring or retaining of them to do so. As the individual who went from America with intent to be enlisted in foreign service was guilty of no crime, the person there who aided or assisted him to do so was not aiding or abetting the commission of any crime. Those who of their own volition wished to leave America and go abroad for foreign service were free to do so, and it was no offense in America to help them. It was only when the arts of seduction were practiced by "hiring or retaining" the persons concerned that the conduct became offensive to the Federal Government and appeared to it serious or likely to involve its neutrality.

And notwithstanding the continuing efforts to preserve neutrality, first between the parties to the

European war at the close of the Eighteenth Century, and afterwards between Spain and Portugal and their revolting colonies in the early part of the Nineteenth Century, we find that the Congress in 1818 codified our neutrality statutes into one act without redefining former offenses or adding any new offenses thereto. Perhaps the gross violation of American neutrality rights by France, which resulted in the abrogation of all treaties with France in 1798 (1 Stats. at L. 578) and in the French naval war at the close of the Eighteenth Century, and the violation of American neutrality rights on the sea by Great Britain which culminated in the war with that country of 1812, may have persuaded the Congress of 1818 that the time was not propitious for the American Government to assume any further obligations on behalf of neutrality.

In 1819 Great Britain passed a new Foreign Enlistment Act, avowedly modeled on the American statute of 1818 and enacted for the expressed purpose of better enabling Great Britain to preserve her own peace and welfare. In the light of the differences which developed between the American statute of 1794 (preserved by the Act of 1818) and the British models of 1736 and 1756, it will be instructive to note the differences developed between the British Act of 1819 and its American model of 1818. The British Act of 1819 (59 Geo. III, c. 69; Appendix Seven), first expressly repealed the former British statutes of 1736 and 1756. With great elaboration it prohibited natural-born British subjects to take or accept or to agree to take or accept foreign military commissions, or otherwise to enter foreign

military or naval service as commissioned or non-commissioned officers, or to enlist or enter themselves, or to agree to enlist or enter themselves in foreign military service as soldiers, sailors or marines, or to engage, contract or agree to go, or to go to any foreign country with an intent or in order to enlist or enter themselves to serve in any foreign service as officers, soldiers, sailors, or marines, etc., etc., without leave or license of His Majesty. This statute then continued to prohibit any PERSON within His Majesty's dominions, or in any place belonging to or subject to His Majesty, to hire, retain, *engage or procure,* or to *attempt or endeavor to hire, retain, engage or procure* any PERSON to enlist or to enter or *engage to enlist, or to serve or to be employed* in foreign service as an officer, soldier, sailor or marine in land or sea service, or to go *or to agree to go or embark* from any part of His Majesty's dominions *for the purpose* or with intent to be so enlisted, entered, engaged or employed as aforesaid. Thus, where the American statute of 1818 prohibited (as the Federal Penal Code still prohibits) any person:

1. To *hire or retain* another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in foreign service;

The British statute of 1819 not only prohibited any person:

1. To hire or retain another person to go or embark from any part of His Majesty's dominions *for the purpose* or with intent to be enlisted in foreign service;

but the British Act of 1819 went beyond this clause corresponding to the similar clause of the American statute and also prohibited any person:

2. To *engage* another person to go or embark from any part of His Majesty's dominions *for the purpose* or with intent to be enlisted as aforesaid;

3. To *procure* any person to go or embark as aforesaid;

4. To *attempt or endeavor to hire, retain, engage or procure* any person to go or embark as aforesaid;

5. To hire or retain any person *to agree* to go or embark as aforesaid;

6. To *engage* any person *to agree* to go or embark as aforesaid;

7. To *procure* any person *to agree* to go or embark as aforesaid; and

8. To *attempt or endeavor to hire, retain, engage or procure* any person *to agree* to go or embark as aforesaid.

It is obvious from the foregoing analysis that the British Parliament in 1819 was not satisfied with merely prohibiting a "hiring or retaining" as the American Congress had done in 1794 and in 1818, and that the British Parliament still appreciated the added significance and importance of prohibiting *procuring* as well.

In 1870 Great Britain adopted a new Foreign Enlistment Act (33 and 34 Vict., c. 90; Appendix Eight). This Act repealed the old Act of 1819. This Act following

ıe general purport of all the preceding Acts, prohibits ritish SUBJECTS from accepting any commissions or en- agements in foreign military or naval service in a ountry at war with a friendly State, *or agreeing to do* , without His Majesty's license, and prohibits British UBJECTS from quitting or going on board any ship with ıe view of quitting His Majesty's dominions, with ıtent to accept any commission or engagement in such oreign military or naval service. The Act also pro- ibits any PERSON within His Majesty's dominions:

1. To *induce,* without His Majesty's license, any ther PERSON *to accept or agree to accept* any commis- ıon or engagement in the military or naval service of ny foreign State at war with a friendly State (Sec- on IV);

2. To *induce,* without His Majesty's license, any ther PERSON to quit, or to go on board any ship with view of quitting His Majesty's dominions, with intent accept any commission or engagement in the military r naval service of any such foreign State (Section V);

3. To induce any other PERSON to quit His Majesty's ominions or to embark on any ship within His Ma- esty's dominions under a misrepresentation or false rep- esentation of the service in which such person is to be ngaged, with intent or in order that such person may ccept or agree to accept any commission or engage- ıent as aforesaid (Section VI), and prohibits,

4. The master or owner of any ship without His Iajesty's license knowingly either to take on board, ngage to take on board, or have on board such ship

within His Majesty's dominions any persons therein described as illegally enlisted persons (Section VII).

In this British Act of 1870 we note the complete absence of all such words as "hire, retain, engage or procure" and we see introduced as a substitute a new term, "induces". "Induce", like "procure", is a word of far wider scope than "hire" or "retain". And yet, notwithstanding the example set by the British Act of 1870, in spite of the attention to the subject which must have been directed to the duties of neutrals, particularly as to recruitment, insisted upon and agreed to by our Government in the Treaty of Washington in 1871 relating to the Alabama claims, in the revision of our statutes less than three years later the Neutrality Act of 1818 became in 1874 Sections 5281 to 5291, inclusive, of the United States Revised Statutes, with no attempt made to add to or change the offenses therein referred to or to modify their definition.

This review of the history of English and American legislation does suggest some pertinent reflections. It must, we submit, be obvious that the act of foreign enlistment has never been considered as an act evil by reason of its intrinsic nature; and that it has been consistently treated as an act objectionable only in consequence of its being forbidden by statute, but which would cease to be objectionable upon a repeal of the statute. In the next place, these statutes contemplate the establishment of contractual relations between the parties concerned; they look to the formation of an engagement, and the consent of the parties thereto; and they postulate a meeting of the minds of

the parties upon the matter of the foreign enlistment,—it would be an ultimate absurdity, resulting in nothing, if there were not this agreement and meeting of minds between the parties. Moreover, all of these statutes presuppose an antecedent right to seek military service where and how one pleased; the very fact of their enactment establishes this; and if that antecedent right had not existed and been recognized, there would have been no occasion for these statutes. None of these statutes were inspired by any definitely formulated theory of neutrality; they were, as a rule, temporary in time and restricted in scope; they were principally occasioned by and served a temporary purpose; and the most that can be said for them is that they merely imposed more or less qualified restrictions upon the conceded antecedent right to seek military service where one pleased. Of course, these statutes created no international offense, but purely a municipal one; and this municipal offense is not to be treated otherwise or differently from any ordinary municipal offense. Nor, in the administration of these municipal statutes in this country, can it make, to any well regulated mind, the remotest difference because the prosecutor happens to be the United States; for the United States

> "must have its rights determined by the same principles applicable to other litigants * * * In no country governed by law could the right of the sovereign and the subject be determined by diverse principles";
>
> *State v. Snider,* 66 Tex. 687; 18 S. W. 106, 109, 110, collecting authorities.

and as observed by Mr. Justice Miller, in discussing in the *Lee* case, infra, certain contrasts between the British system and our own:

> "Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right" (1 U. S. Sup. Ct. R. 251).

And as supporting the view that, particularly in a criminal cause, no intendments are to be indulged in favor of the Government, but it is to be treated precisely the same—no better, no worse,—than any other ordinary litigant, see:

U. S. v. McDaniel, 32 U. S. (7 Pet.) 1;
Mitchel v. U. S., 34 id. (9 Pet.) 711;
Brent v. Bank, 35 id. (10 Pet.) 615;
The Siren, 74 id. (7 Wall.) 159;
The Floyd Acceptances, 74 id. 675;
U. S. v. Smith, 94 id. 217;
U. S. v. Lee, 106 id. 196;
U. S. v. Beebee, 127 id. 338;
Moses v. U. S., 116 Fed. 526, 529;
U. S. v. Stinson, 125 id. 907;
Shannon v. U. S., 160 id. 870, 876;
State v. Snider, 66 Tex. 687.

And that in this investigation, we are not concerned with the political consequences of a correct decision, or with any dissatisfaction which such decision may create in any quarter whatever, the following passage from the opinion of Pollock, C. B., in *Attorney General v. Sillem,* 2 Hurl. & Colt. 429, 510-11, may not inaptly be referred to:

> "So, also, I think that we have nothing to do with the political consequences of our decision or the dissatisfaction which it may create in any quarter anywhere, and I cannot help expressing my regret not unmixed with some surprise, that the learned Attorney-General has more than once adverted to the consequences that may arise from our holding that what the defendants have done is not contrary to our municipal law. That it is not contrary to the law of nations he has distinctly stated, and indeed made it the subject of an argument (*in another place, as I think they call it),* 'that other countries have no right to complain of it as a violation of the law of nations'. On the first day of his argument, he pointed out how the supply of ships would work practically between a powerful country and a weak one, and he imagined (I am quoting his very words) 'this country at war with France, and the dockyards in Sweden supplying, fitting out, and equipping vessels of war for France', and he suggested that we might say, as he says we always have done in the course of our history, 'We will not endure it, and if this goes on we will rather go to war with you than let war be carried on practically against us from your shores, under pretence of neutrality. That we should do that with a weak power like Sweden', the Attorney-General asks, 'can any human being entertain a doubt?'. He then goes on to suggest that a great power, like the United States, would adopt the same views, would look broadly at the practical mischief, would care nothing for Vattel, Grotius, or Puffendorf, and would say, 'It is in substance as noxious as war, and we will not endure it'. I must say I doubt whether such views and such doctrines ought to be presented to us at all. I am sure that they will not influence our judgment, and I am inclined to sus-

pect the soundness of any proposition of law which requires such a style of argument to support it. Indeed I may add that international law would be of very little use, if it were not to govern the conduct of *strong* nations as well as of *weak* ones. I would rather state the passage in the Attorney-General's own words, because I should be very sorry to misunderstand or to misquote anything that fell from him. He says, 'Can anyone doubt that that is the way in which such a state of things would work practically as between a powerful country and a weak one?' Then he imagines the case of Sweden, and then he says, 'That we should do that with a weak power, like Sweden, can any human being entertain a doubt?' I venture to entertain a doubt, and to express a hope that this country would not sully its high character by adopting towards a weak state a line of conduct which it would not think prudent or politic towards a stronger one. I certainly had thought that the object of international law was, among other things, to state and define what acts, what conduct of any state, would justify war being made upon it by another state. But the Attorney-General seems to think, that if one nation be strong and another weak, the strong one will make war on the weak, though it has no violation of international law to allege against it and to complain of, but merely some inconvenience arising from the neutral state continuing its commercial relations with another power with whom it has been accustomed for a long time to maintain them.

Again, on the second day, the Attorney-General said: 'The peace and welfare of the kingdom, perhaps of the world, is declared by the legislature to depend' upon this matter. When his attention was called to this from the Bench, he said, that perhaps he was going too far in saying 'the peace of the world', and no doubt he was, for there is not any declaration by the legislature about '*the peace of the world*' at all, and the expression 'peace and welfare of this kingdom,' which no doubt is in the preamble, I believe relates, as far as peace is concerned, only to that tranquillity which is in the care of the magistracy, and has nothing whatever to do with the relations of peace or war with respect to other countries.''

Construction. Bearing in mind the reflections suggested by the history of the legislation under consideration, and approaching Section 10 of the Federal Penal Code for the purpose of determining its scope, meaning and effect, what should be the mental attitude of an inquirer dealing with a criminal cause? That this section is a part of a scheme of legislation, relating to neutrality, may be true; but it is also true that this scheme is imperfect, ambiguous, inconsecutive, and a striking illustration of the triumph of makeshift expediency, over system, logic and principle. Neither Chapter 2 of the Federal Penal Code, nor Section 10 thereof, establishes any general criterion for the assessment of the neutral or unneutral aspects of conduct. No principle or standard is erected thereby to rule the subject generally; a few scattered aspects of conduct are picked up and an accent placed upon them alone, while all other modes of conduct are ignored, and both the chapter and the section single out, without the slightest regard to system, logic or principle, and purely as a makeshift expedient for tiding over a transient difficulty, a few discrete phases of conduct, denounce them as unneutral, and leave wholly untouched a vast field of malign human activity. Thus, so far as affected by Chapter 2 or Section 10, is it neutral or unneutral for a ship, in one of our ports, to load contraband and proceed to deliver it to a belligerent in a belligerent port? Such conduct may subject the cargo to seizure by the other belligerent; but since there are no common law offenses against the United States, since our Federal criminal jurisprudence is founded upon statute, since before a man can be

punished his case must be plainly and unmistakably within the statute, since constructive crimes built up by courts with the aid of inference, implication and strained interpretation are repugnant to the spirit and letter of English and American criminal law (*U. S. v. Hudson,* 7 Cranch 32; *U. S. v. Britton,* 108 U. S. 199; *U. S. v. Eaton,* 144 id. 677; *U. S. v. Brewer,* 139 id. 278; *Cooley's Const. Limit.,* p. 47, 7th ed.; *Ex parte McNulty,* 77 Cal. 164, 168), since these things are so, by what provision of the Federal Penal Code, is the case just put made an indictable offense? Plainly, there is no such provision included within this haphazard chapter; and while the carriage of the contraband cargo may be an offense against international law which might subject the cargo to seizure, yet that conduct would not offend any municipal law of ours, because not unneutral.

Another example of the imperfections and shortcomings of this legislation may be found in the trade in arms and ammunition. Who would pretend to claim that any provision of this Chapter 2 denies to neutrals the right to export arms and ammunition to either belligerent? That neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to belligerent powers, arms, ammunition or other similar contraband of war subject, of course, to the right of seizure and confiscation, no one can doubt (1 *Kent,* Comm. Star, p. 142; *The Santissima Trinidad,* 20 U. S. (7 Wheat.) 283, 340; *U. S. v. Turnbull,* 48 Fed. 99, 108); but it is characteristic of the sketchy and haphazard legislation under consideration, that, while professing the maintenance of neutrality, it yet ignores a condition of things

which always operates to the undue advantage of the nation possessing the superior navy.

Again, as illustrating the imperfections of this legislation, it may be pointed out that those who adopted it, were advised as far back as 1855 that "Every resident of the United States has a right to go to Halifax and there to enlist in any army that he pleases" *(U. S. v. Hertz,* 26 Fed. cases No. 15,357, p. 295); and as far back as 1896 they were told that our neutrality laws do not prohibit persons within our jurisdiction, whether citizens or not, to go as individuals to foreign states, and there enlist in their armies (*U. S. v. O'Bryan,* 75 Fed. 90); and yet, under this inscrutable legislation, particularly as interpreted in the court below in this cause, one who does not enlist such person, but merely aids him financially to go a portion of the way towards a foreign country, may actually be indicted for helping in the performance of a perfectly legal act. Another illustration of the shortcomings of this legislation is to be found in the fact that it contains no provision whatever inhibiting the making of loans by our people to either belligerent engaged in a foreign war. Thus, within very recent times, it was not considered unneutral for commissioners from England and France, then allied in a foreign war, to come to the United States to borrow large sums of money, nor was it considered unneutral for our people to loan money to those belligerents; and the attitude was taken that this conduct was not unneutral, notwithstanding that such a loan would be of infinitely greater assistance to the favored belligerent than the handful of men which the indictment in the

present cause asserts to have been aided to their homes by the defendants.

And a consideration of our Neutrality Act of 1794 and our subsequent Acts, section by section, demonstrates their practical limits and evidences an intent to stop far short of what the recognition of the standards of an absolute morality might require in the interests of neutrality. Indeed, the distinction between the obligations of a positive international law and of the speculative law of nature (whose moral commands some writers affect to believe constitute the foundation of the law of nations) were sharply recognized by Chief Justice Marshall in *The Antelope,* 10 Wheat. 66, 120, 121.

Thus, Section 1 of the Act of 1794 (9 Fed. Pen. C.) denies to an American *citizen* the right within the territory or jurisdiction of the United States to accept and exercise a commission to serve a foreign prince or state in war, with whom the United States are at peace. No person in America who is not a citizen is affected by this prohibition (charge to the Grand Jury, 1838, *2 McLean* 1, 30 Fed. Cas., No. 18,265). Any American citizen outside the United States can accept and exercise such a commission (ibid). The acceptance within American territory of a commission without any exercise of the commission here is not a violation of the statute (ibid). It is apparent that this section has nothing to do with the law of nations or with the preservation of neutrality. It is enacted solely to protect the sovereign rights of the United States and to hold American citizens while on American soil to their true allegiance.

If it were an offense against the neutral duty of the United States to permit a citizen on its soil to accept and exercise a foreign commission, it is inconceivable, if the moral obligation of the duty is to prevail, why it is not equally a violation of that duty to permit an American citizen to accept and exercise such a foreign commission abroad. In the latter case he may be of more direct assistance to the belligerent than in the former. He is just as much an American citizen when abroad as he is when at home, and may be made equally subject to our jurisdiction, though the right to inflict punishment upon him may not be exercisable until he returns within our territory.

The British Foreign Enlistment Acts of 1819 and of 1870 prohibit British subjects accepting such commissions, both within and without the dominion of Great Britain; and offenses against assumed neutrality obligations when committed by American citizens abroad were denounced by the Statute of 1797, no longer in force (1 Stat. L., p. 520).

Section 2 of the Act of 1794 is Section 10 of the Federal Penal Code, the section immediately concerned in the case at bar. But by the proviso to this Section 2 in the Act of 1794, and by a similar proviso now found in Section 18, Federal Penal Code, subjects of a foreign prince transiently within the United States may enlist or enter themselves, or hire or retain like subjects transiently within the United States to enlist or enter themselves to serve such prince on board any vessel of war, letter of marque or privateer of such prince, which at the time of its arrival within the United States

was fitted and equipped as such, if the United States are then at peace with such foreign prince. Why this exception, if the moral notion of neutral duty is to prevail? Is not the foreign belligerent ship aided as much by the recruitment of transient aliens as it would be by the recruitment of American citizens? Note that this right of recruitment is not limited to a right to engage such men as may be necessary for the safe navigation of the ship due to losses received at sea, and therefore, is not in analogy with the right to furnish repairs to a ship made necessary for its safety by reason of injuries received at sea. There may be practical reasons for such a provision in the law. It may be believed that permitting the recruitment of transient aliens on board of such belligerent ships would not be seized as a pretext of war by any nation, but this is entirely a practical consideration and has nothing to do with any moral obligation.

Notwithstanding this section of the law (Sec. 2 of the Act of 1794, 10 Fed. Pen. C.), any alien is free to leave America with intent to be enlisted in the service of a foreign sovereign, and any American citizen is free to leave America with a similar intent.

U. S. v. Hertz, 26 Fed. Cases 15,357;
United States v. Hart, 74 Fed. 724;
United States v. O'Brien, 75 Fed. 900;
United States v. Nunez, 82 Fed. 599;
Wiborg v. United States, 163 U. S. 632; 16 U. S. Sup. Ct. R. 1135.

And this right just referred to is also recognized by Article VI of the Fifth Convention of the Second Inter-

national Peace Congress at The Hague of 1907 (*2 Malloy's Treaties etc.,* 2298).

So also aliens or American citizens may go abroad with the intent referred to in company with one another provided the manner of their departure does not constitute a military expedition within the meaning of Section 13, Federal Penal Code (Sec. 5, Act of 1794, Sec. 6, act of 1818, U. S. Rev. Stat. 5286).

United States v. Nunez, supra;
United States v. O'Brien, supra.

And one may transport persons out of this country and land them in foreign countries when such persons have an intent to enlist in foreign armies (*The Laurida,* 85 Fed. 760; *Wiborg v. United States,* supra).

All such acts as the foregoing, however, are prohibited to British subjects by the British Foreign Enlistment Acts of 1819 and 1870. If moral notions are to prevail, and not the positive rules established by custom or treaty, why these exceptions in the American law? The acts permitted are as much a violation of the moral obligations of a neutral as the acts prohibited.

Section 3 of the Act of 1794 (11 Fed. Pen. C.) prohibited any person to fit out and arm or to attempt to fit out and arm or procure to be fitted out and armed, or knowingly to be concerned in the furnishing or arming of any ship or vessel with intent that such ship or vessel should be employed in the service of any foreign prince to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince with

whom the United States are at peace, or to issue or deliver a commission within the territory or jurisdiction of the United States for any such ship or vessel with the intent that she might be employed as aforesaid.

This section of the law just referred to did not prohibit the sale to a foreigner in American waters of a vessel built in this country "with the express view of being employed as a privateer, in case the then existing controversy between Great Britain and the United States should terminate in war", though, "some of her equipments were calculated for war", but "were also frequently used by merchant ships". And this transaction was no violation of the Act of 1794, though the foreigner, a Frenchman, who purchased her, proceeded with her "to a French island, where she was completely armed and equipped and furnished with a commission", and though "she afterwards sailed on a cruise during which the (British) prize was taken and sent in to Charleston." (Parenthesis ours.)

Moodie v. The Ship Alfred, 3 Dall. 307.

So, a ship armed and equipped for war, carrying twelve guns, could be dispatched from Baltimore in 1816, under instructions to sell her to the Government of Buenos Ayres, then at war with Spain, if a suitable price could be had, and yet this transaction, it was held, was not in violation of American law *or of the law of nations,* it appearing that prior to her sale she had committed no act of hostility and had sailed under the American flag.

The Santissima Trinidad, 7 Wheat. 283.

Doubtless the precise construction given to Section 3 of the Act of 1794 in the foregoing authorities was due in part to the fact that the Act defined a penal offense, but these authorities also evidence that the court could not be persuaded to strain the letter of the statutes beyond its plain terms, on the basis of any theory that might have been urged upon the court that the *spirit* of the law required such an extended construction or that the acts under consideration were *in spirit* a violation of the laws relating to the preservation of neutrality; or, as expressly urged in the *Alfred* case, supra, "that if it was tolerated as legal, it would be easy by collusion to subvert the neutrality of the United States and involve the country in a war" (page 307). But as the court must have appreciated that the Congress, in prohibiting to all persons on United States territory those acts which were proscribed by its laws, was going far beyond any duty imposed on the United States Government in its capacity as a neutral, the court very properly refused to punish acts which the Congress had not deemed it important to penalize, however similar such permitted acts might be to those prohibited, or however likely to involve the United States Government in international trouble, or however inconsistent with such a neutrality obligation as might be suggested by an absolute moral idealism.

So, too, a similar attitude is shown by the Supreme Court when the construction of Section 4 of the Act of 1794 is under review. That section prohibited any person in the United States to increase or augment, or to procure to be increased or augmented, or to be know-

ingly concerned in increasing or augmenting the force of any foreign ship of war, cruiser, or other armed vessel, by adding to the number or size of the guns of such vessel prepared for use, or by the addition thereto of any equipment solely applicable to war, if such vessel at the time of her arrival in the United States was in the service of a foreign prince, etc., or belonged to his subjects, and such prince, etc., was at war with another prince, etc., with whom the United States were at peace. In 1818 the phraseology was changed a little, and instead of reading "by adding to the number or size of the guns", as in the Act of 1794, the corresponding section in the Act of 1818 read "by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber." The latter wording, emphasizing augmentation as the essence of the offense, was retained in the United States Revised Statutes and in the Federal Penal Code. Under this fourth section of the Act of 1794 it was held that there was no violation of the law if a French privateer, during the war between France and Great Britain, entered the Port of Charleston, armed and commissioned for war, and there had her guns, masts and sails taken out and put on shore, while she underwent general repairs, when they were again put on board with the *same force or thereabouts.* The court said:

> "In the present case, the privateer only underwent a repair; and the mere replacement of her force cannot be a material augmentation, even if an augmentation of force could be deemed, which we do not decide, a sufficient cause for restitution."

Moodie v. The Ship Phoebe Anne, 3 Dall. 319.

To a similar effect was the decision in *Geyer v. Michel,* 3 Dall. 285, the facts of which case are not given in the official report, but may be found in *7 Moore's International Law Digest,* page 907, and are as follows:

The Citizen of Marseilles, a French privateer, came to the United States from San Domingo with twenty-eight guns, twelve of which were mounted and sixteen of which were in the hold and had been replaced by wooden guns. Some of her portholes had been closed, and in this condition she entered the Port of Philadelphia.

> "Here she was repaired; some improvised staterooms, used on the voyage for passengers, were knocked down; the vessel was caulked; her old gun carriages were repaired, and some new ones made by her own carpenters, in place of an equal number of old ones which were broken up. The eyebolts, for fixing the gun-tackle, were taken out and replaced, and she was furnished with a new mast. She sailed from Philadelphia in the day time, and it was not till she had left the Delaware Capes that she opened the portholes that had been closed and mounted the guns in her hold."

The court took the view that there had been no augmentation, and refused restitution of the prize captured by this privateer.

It was held that repairing the waist and cutting two portholes in it for guns, at a port of the United States, of a vessel fitted out and commissioned as a vessel of war when she entered, does not by itself constitute an augmenting of her force within the meaning of the Act of the 5th of June, 1794.

> *The Brothers*, Bee 76 (7 Moore's Int'l Law Digest, 908).

If an exchange were made with a foreign vessel, gun for gun, though the guns given in exchange were more efficient, it would seem as though the Congress *ex industria* had desired to indicate its approval of such a commerce. In this respect our statutes fall short of the British Acts of 1819 and 1870, both of which on this subject provide "by adding to the number of the guns of such vessel, or by changing those on board for other guns", without regard to caliber, or efficiency.

So, too, if additional equipment were furnished such a ship, applicable for war and for other purposes as well, it would constitute no offense under the American Neutrality Acts, as it would not be "equipment solely applicable to war", but it would under the British Acts of 1819 and 1870, because both the latter read "the addition of any equipment for war".

Thus, it is apparent how the American Neutrality Statutes in their relation to neutrality are wholly practical, rather than the result of any effort to make a nice adjustment between Federal municipal law and the developing neutrality obligations of the United States under international law. The greater precision and the wider scope found in the British Acts of 1819 and 1870 were wholly ignored in the revision of our statutes in 1874 and in the enactment of our penal code in 1909.

These, and other similar considerations growing out of the imperfect and inadequate condition of this legislation, go, we submit, a long way to strengthen the contention that this imperfect chapter and section should not, by any process of judicial construction, be strained

or enlarged beyond its plain terms,—particularly since no "equitable" construction can be applied to a criminal statute (*The Emperor of Austria v. Day,* 3 De Gex, Fisher & Jones 217, 239; *Attorney-General v. Sillem,* 2 Hurl. & Colt. 430, 508).

Another consideration relevant to the uncertain and unsatisfactory condition of this legislation is suggested by the agreed statement of facts in this cause. It is there stated as a fact that, while on the one hand, the Kingdom of Great Britain does not have now, and did not have at the times mentioned in this cause, any law or laws providing for compulsory service of its subjects in either its army or navy (par. 3), yet, on the other hand, in the German Empire, the French Republic, the Austria-Hungary Monarchy, the Kingdom of Italy, the Russian Empire, and the Kingdom of Servia, there are now and at all the times in the indictment mentioned were laws enforced for the compulsory service of their subjects in their armies and navies, and the subjects of those countries in the United States of America have heretofore, and during the times in the indictment mentioned, returned freely from the United States of America to their countries for military service as required by their respective laws, and have been aided and assisted thereunto by their respective consular and diplomatic officers. Why should, in any adequate system of neutrality, a privilege be permitted to one or more belligerents, but denied in an exceptional case? Why should the enumerated nations be permitted freely to return their reservists, but Great Britain be denied the right to assist home British subjects who are under no

sort of contract or agreement to enlist in military service? A moment's consideration will show that such a practical construction as this involves a most unjust discrimination, which, we think, never was intended by Congress, and never should be imputed to that body; and to appreciate the working of this discrimination, a word or two concerning its subject-matter may not be out of place. If we glance back at the history of military institutions in Europe since the fall of Rome, we find that it divides itself into four well-defined periods. In the first or barbarous stage we have vast armies, or hordes, formidable from their numbers and the courage of the warlike free men composing them, but almost without tactics or organization. In the second or feudal period, we have armies almost as numerous, but whose strength lay entirely in a small body of highly equipped knights and men at arms,—the bulk of the army no longer free men fighting for their country, but slaves fighting at their lord's command. Little progress has been made in tactics and organization, and the fighting power of nations is exhausted in constant petty wars. In the third, or "standing-army", we have small armies of highly trained professional soldiers, forming a class distinct from the rest of the population, tactics and organization becoming a science and making vast progress. Lastly, under the conscription, we have armies once more national, embracing the whole male population, more numerous than ever, but now trained and organized with all the science and skill of professional soldiers.

History exhibits two methods of raising armies,—that of voluntary enlistment, and that of compulsory levies

or conscription. The former of these was once the universal system, but is now retained by Great Britain alone; but the latter has been adopted by all other European powers. Conscription may be said to be compulsory military service of persons selected by lot; but this conscription in the proper sense is now rarely practiced. The principle of universal liability to service, though, which may be called compulsory service in opposition to conscription, draws into the active army all, or nearly all, the men of military age for a continuous period of short service with the colors, after which they pass to the "reserves". By this method the state has an almost inexhaustible supply of trained soldiers at its disposal for war, and the number of trained men in reserve available for war purpose is in theory that of the able-bodied manhood of the country. In the event of war, these reserves are subject to recall to the active army. Since 1870, then, with the single exception of Great Britain, all the major European powers have adopted the principle of compulsory short service with reserves, but the whole of the military forces of England are raised by voluntary enlistment.

By voluntary enlistment, the burden of military duty is distributed evenly throughout the community, the soldier receiving fair wages for his service, while the citizen bears his share in the form of taxes. Personal liberty is not interfered with, the industry of the country generally is undisturbed, those members only are withdrawn who are likely to contribute least to its wealth, and the army becomes a useful school and refuge for the restless classes of the community. But the supply

of recruits is fluctuating and uncertain; they are drawn almost entirely from the poorer and uneducated class, and the army tends to become a class rather than a national one.

Compulsory service, on the other hand, gives unlimited command of men; introduces a higher class into the ranks, and raises the tone of the army generally, while military efficiency alone has to be considered in organization. But it presses much more severely on the country, it becomes a tax inflicted by lot, it falls with excessive weight upon some, while others escape free, and it interferes with and suspends the civil development of the citizen. Hence, wherever the system obtains, it is usually accompanied with provisions for softening its hardships and reducing its inequality; usually the time of service is reduced to a minimum; but still, so heavily does conscription press on the life of a nation, that it may safely be asserted that no nation ever did or will accept it, except as a matter of necessity.

In olden times, fresh armies were raised on the outbreak of each war; no nation can afford to keep constantly under arms the whole force which it may be required to put forth in war; and thus it has come about that the history of warfare really exhibits three systems of terms of service. The first of these was the long service system, whereby after many years, when the soldier was no longer fit for service, he was pensioned; but this system is practically obsolete. The second was the militia system, whereby, during a limited period a partial training was given to the inhabitants, but no permanent

army was maintained. The third and intermediate system was and is that of compulsory short service and reserves now adopted, as already observed by all the European powers except Great Britain. Its principle is to maintain cadres of a large army in peace, capable of expansion in war, and to keep the recruit in the ranks only so long as is necessary to make him a trained soldier, and then pass him into a reserve; it combines the numerical strength of the militia system with the organization, training and discipline of a long service army; and it may be said that the great step in modern organization is this maintenance of permanent cadres and the promotion of trained reserves. Military forces, among all of the European powers, except Great Britain, are now divided into "standing armies", comprising those who are actually doing duty with the colors as soldiers, and forming in peace times the cadres and the school of instruction of the army; and reserves, under which name are included all who pursue their industrial callings in peace, but are called to arms in war.

This "short service and reserve" system was, like so many other things, an outgrowth of the French Revolution. In 1792, when, as already pointed out, the monarchs of Europe banded to crush the revolution, the military force of France was at a very low ebb. The old Royalist Army was disorganized by revolutionary passions and frequent changes, and the constituent assembly had rejected the proposed "compulsory service" as at variance with the liberty of the citizen. But on the proclamation that "the country was in danger", volunteers flocked from all parts to join the

armies, and a levy en masse was ordered to repel the invaders. Officials vied in proving their zeal by the numbers of recruits they forwarded to the frontiers, and patriotism and terrorism combined to fill the ranks. Within three years, nearly 1,200,000 men were thus poured into the army, and sufficed to repel the invaders, and form the armies which, under Hoche, Moreau and finally under Bonaparte, brought France forth victorious in 1797. But the long and bloody war had exhausted the supply, large as it was, and some new system of recruiting became necessary, because it was evident that voluntary enlistment would no longer suffice. In 1798, therefore, Jourdan brought forward and passed the law establishing conscription, the basis of all French military legislation since that date, and more or less that of other countries also. Every citizen was declared liable to service for five years, and the whole male population, between the ages of twenty and twenty-five, was divided into classes and enrolled by name, to be called upon as occasion required. It was the terrible power of the conscription that enabled Napoleon to carry on the gigantic wars which characterized his reign, and after losing in the snows of Russia the largest army ever put in the field, to reappear in a few months with another almost as large. Other nations of necessity followed the example of France, and the conscription became general.

But Prussia still further developed its power by reducing the period of service in the ranks, and passing her soldiers as soon as sufficiently trained into a reserve, thus gradually training the whole of her popula-

tion; and this "short service and reserve" system, the greatest revolution ever effected in this branch of military art, owed its origin to the conditions imposed upon Prussia by Napoleon at the Treaty of Tilsit. Restricted by that treaty to an army of 43,000 men, the Prussian statesman evaded the spirit of the clause by sending the trained soldiers to their homes to be recalled when needed, and replacing them with recruits. This system, by which every citizen becomes also a trained soldier,—and there is no limit to the size of the armies save that of population,—was at first only partially adopted by other countries. The prejudice in favor of professional armies—soldiers whose business it was to fight and do nothing else,—was too strong and doubts were felt whether these semi-citizen armies would stand the rough trials of war. But, after Sadowa, where the Prussians defeated the Austrians on July 3, 1866, in the decisive battle of the "Seven Weeks' War", other nations had no choice but to copy it or resign their military position. It is true, the lesson was not learned at once by all, but 1870 and 1871 enforced what 1866 had already taught; and within the last few years every great European power, except Great Britain, has reorganized its military institutions on the model of Prussia. These historical facts, about which there can be no dispute, make clear and manifest the gross discrimination against Great Britain, and in favor of the other Continental powers of Europe if the reserves of the latter are to be freely permitted to return, but British subjects, under no obligation whatever to enlist, are to be denied the right of return to their country, and the

right to receive assistance for that purpose. And as bearing upon this subject-matter, we respectfully direct the attention of the court to the views of the Attorney-General of the United States, as contained on pages 26 and 27 of his memorandum of law on the construction of Section 10 of the Federal Penal Code. We respectfully insist, therefore, that in the construction of the legislation under consideration, such an effect should be given to that legislation as to avoid the unjust discrimination above adverted to. This, we think, would furnish a very convincing reason for confining the scope of the legislation under consideration within proper bounds, so as to avoid the unjust discrimination which would attend a loose construction of this penal statute. We do not believe that Congress ever intended any injustice to a country which relies upon voluntary enlistment, in which no man can be compelled to enlist, which has no conscription system, nor any system of compulsory service with reserves and in which there are no reserves by conscription or compulsion, but only by voluntary action; we cannot believe that any intent should be imputed to Congress unjustly to discriminate against Great Britain, while allowing the other countries referred to in the agreed statement of facts freely to send home their compulsory reserves and to be aided in that by their respective consular and diplomatic officers. The discrimination here referred to cannot be reconciled with the nature of neutrality as explained by Ross, J., in *U. S. v. Turnbull,* 48 Fed. 99, 105.

Let us here consider for a moment the prohibitions of Section 10, Federal Penal Code, and the correlative

sections of the earlier statutes on which it was based in their relations to the obligations of the United States as a neutral power.

Section 2 of the Neutrality Statute of 1794 (now 10 Fed. Pen. C.), so far as the same related to foreign enlistment of soldiers, was not a prohibitive measure necessary on the part of the United States to enable them to observe the obligations of their treaty stipulations in 1794. The treaty with Prussia (Article XX) of 1785 only prohibited the United States from hiring, lending, or giving any part of their naval or military force to the enemies of Prussia (*2 Malloy's Treaties, etc.,* 1483). The two treaties with Sweden (*2 Malloy's Treaties, etc.,* 1725 et seq.), the treaties with France (*1 Malloy's Treaties, etc.,* pp. 468 et seq.), the treaty with the United Netherlands (*2 Malloy's Treaties, etc.,* pp. 1233 et seq.), were silent upon the subject. Aside from the aforesaid treaties and the treaty with Prussia already referred to, the United States in 1794 had negotiated a treaty with only one other power, namely, Morocco in 1787, Article II of which reads as follows:

> "If either of the parties shall be at war with any nation whatever the other party shall not take a commission from the enemy, nor fight under their colors."
>
> *1 Malloy's Treaties, etc.,* p. 1207.

Whatever this article of the treaty with Morocco may mean it is clear that it had no influence in the framing of the original temporary Statute of 1794 intended to direct the course of the United States and its people during the period of the European war, to which Morocco was no party.

Neither was this Section 2 of the Neutrality Statute of 1794 enacted for the purpose of preventing individual conduct in its territory, which if permitted would involve the United States in an offense against the law of nations, and therefore affect its neutral character. To permit belligerent powers to levy troops in American territory for their uses would no more violate the law of nations, or affect the neutrality of the United States, than to permit belligerents to equip their vessels of war within our territory and augment their forces by arms and men. Thus, Chief Baron Pollock was of the opinion that the British Foreign Enlistment Act of 1819, modeled on the American Act of 1818, prohibited acts which no duty of international law required Great Britain to suppress (*Attorney-General v. Sillem,* 4 Hurl. & Colt. 514). And Bramwell agreed with him (p. 531).

As the American decision in the *Brig Alerta v. Blas Moran,* 9 Cranch. 359, 365, is authority for the proposition that permitting belligerents to equip their ships and augment their forces with men and arms would not constitute a violation of neutrality provided the permission were impartially accorded, it necessarily follows that permitting belligerents to levy troops in American territory would not constitute a violation of neutrality, provided that permission were impartially accorded. Furthermore, before it can be claimed that to permit belligerents to levy troops in the territory of a neutral constitutes a violation of neutrality, and therefore an offense against the law of nations, it must appear, in the absence of treaties, that the custom of the nations made it a rule of the law of nations that it was their duty

to deny such permission. For "customs and treaties are the two exclusive sources of the law of nations" (*Oppenheim's International Law,* Sec. 19). And our Supreme Court has practically adopted this view (*Paquete Habana,* 175 U. S. 677, 700; 20 U. S. Sup. Ct. R., 290, 299).

> "This which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage."
>
> *The Antelope,* 10 Wheat. 66, 120-121.

When the custom of the nations is considered it appears not only that such permission was quite commonly accorded, but it necessarily follows that no such rule of the law of nations had been established or recognized. The use of mercenary troops in Europe had been a very common practice prior and up to 1794. Vattel refers to and approves of it in his *Law of Nations,* Book 3, Chap. 2, Sec. 13; and Book 3, Chap. 15, Sec. 230. Machiavelli, in the Sixteenth Century, in "The Prince", had devoted two chapters (Chapters 12 and 13) to the respective advantages of mercenaries, auxiliaries and the Prince's Own Troops. Stephen, in his *History of the Criminal Law of England,* Vol. 3, page 238, refers to it in language already quoted.

In a recent book on *"The British Army of Today",* by Capt. A. H. Atteridge, the author says:

> "There was a Scotch Regiment serving in France under Louis XIV which traced its origin to the still earlier Scots Brigade which had served under Augustus Adolphus in the Thirty Years' War. * * * A Third Regiment of the Line was formed in 1665, when the Dutch Republic dismissed the English troops which had long been in its service" (page 11). "The 5th and 6th Foot were originally

> English Regiments in the service of William of Orange which came to England with him in 1668'' (page 12). ''In the first American War our army had sunk to a low ebb of efficiency and organization and the difficulty of obtaining recruits was met by hiring mercenary troops from the petty princes of Germany to fight against the revolted colonists beyond the Atlantic'' (page 17).

The same author in this book, referring to the War of the Crimea, says:

> ''But once more recourse had to be had to the system of paying large bounties for enlistment and enrolling of foreign legions of Germans, Italians, Turks and Portuguese'' (page 24).

During the War of the Crimea the British Parliament passed an Act to provide for the enlistment of foreigners in the military service of Great Britain (*5 Messages and Papers of the President's,* p. 332).

Indeed not only was it customary to levy mercenaries from neutral populations without involving the neutrality of the nation, but neutral states might furnish troops to a belligerent in accordance with treaty provisions. This right was recognized by Vattel in his *Law of Nations,* Book 3, Chapter 6, Section 101. Sweden was the first nation to question this right:

> ''It was not, however, until 1788 that the right of a neutral to furnish troops to a belligerent in accordance with treaty provisions was seriously questioned. In that year Sweden claimed that by rendering military assistance to Russia, then at war with Sweden, Denmark was violating the laws of neutrality, notwithstanding the fact that such assistance was provided for by the treaty between Denmark and Russia. In taking this position, Sweden was considerably in advance of the time, she was anticipating a future rule rather than stating an existing one.''
>
> *Maxey's International Law,* page 530.

But the right which Sweden denied was such a right as the United States of America had relinquished in its treaty with Prussia. It was the right of the state as such to furnish troops, not the right of the state to permit troops to be levied on her soil from among her citizens or inhabitants.

But the authorities are unanimous so far as the right of a nation is concerned to permit troops to be levied on its soil for a belligerent without a violation of neutrality.

In *Martens' Law of Nations,* as translated and published by Cobbett in 1795, an edition which was dedicated to Washington, Martens recognizes the right of a neutral to allow a belligerent to levy troops on its soil without any violation of its neutrality (Book 8, Chap. 6, Sec. 4, p. 312).

Vattel in his *Law of Nations* warmly defends the use of mercenary troops, and justifies the sovereign who permits his subjects to serve foreign powers (Book III, Chap. 15, Sec. 230; Book III, Chap. 2 Sec. 13).

Bynkershoek could not see "any difference between enlisting men and purchasing gun-powder, ammunition, arms and warlike stores", and as he approved the one so he approved the other.

> *Law of War* (being 1st Book of Bynkershoek's Quaestiones Juris Publici, translated) Du Ponceau page 178.

Kent even goes so far as to recognize the right of a neutral country, without a violation of its neutrality, to furnish troops to one of the belligerents in perform-

ance of a treaty stipulation previously made in time of peace.

1 Kent's Commentaries, 116.

And the same view was taken by Wheaton in 1836 (p. 517).

Manning, in 1839, took a similar view and refers to it as, in his day, "an undisputed principle of the European law of nations".

Manning Common Law of Nations, page 225.

It is clear that if a nation as such could furnish troops under the circumstances named without violating its neutrality obligations under international law, the mere permission to a belligerent to levy troops on the soil of the neutral would not under international law violate the neutrality obligations of the neutral. In 1863, on this subject, Twiss said:

> "It is competent for every independent state to allow the agents of a foreign power to enlist persons within its territory for its military or naval service, and such conduct will be consistent with neutrality so long as the state does not permit any belligerent power to do so, and refuse the like permission to its adversary."

Twiss Law of Nations, Rights and Duties of Nations in Time of War, Section 223.

This view, expressed by Twiss in 1863, is in harmony with the view of our Supreme Court as expressed in the *Brig Alerta,* supra in 1815, already quoted.

In 1855 the Attorney-General in a report to the President, commenting on the subject of permitting troops to be enlisted on American soil by a belligerent, after

stating that the acts of enlistment referred to were contrary to the municipal law of this country, said:

> "Those acts if permitted to one belligerent must be permitted to all in observance of impartial neutrality."
>
> *7 Opinions of Attorneys General,* page 377.

And in 1915 Mr. Charles Warren, Assistant Attorney-General in his Memorandum of Law on the construction of Section 10 of the Federal Penal Code asserts that no writer on international law had prior to 1794

> "asserted the doctrine that it was the duty of a neutral nation absolutely to prevent levy on its soil of troops for foreign enlistment" (p. 10).

So that in 1794, and for many years later, if indeed at all, it is clear that no custom had developed which imposed an obligation upon a neutral country to prevent the levying of soldiers upon its territory by belligerent powers. As though to emphasize the right of the United States, in the absence of treaty stipulation, to grant permission to belligerents to levy troops on their territory if they so desired, it is expressly stipulated in the treaty with Great Britain of 1794, concluded after the passage of the American statute of 1794, by Article XXI as follows:

> "nor shall the enemies of one of the parties be permitted to invite or endeavor to enlist in their military service any of the *subjects or citizens* of the other party; and the laws against all such offenses and aggressions shall be punctually executed" (italics ours).
>
> *1 Malloy's Treaties,* etc., 603.

This clause expired by the terms of the treaty October 28, 1807 (Article XXVIII), and has not been renewed.

No such clause can be found in any treaty with the United States negotiated before this Treaty with Great Britain. No such clause can be found in any treaty negotiated since the Treaty with Great Britain of 1794, nor is the subject referred to in any treaties to which the United States were parties, prior to 1871. In 1871 the subject in very restricted form was mentioned in the Treaty of Washington under authority of which the Alabama claims were settled by the Geneva Arbitration Tribunal, and it is again referred to in the Fifth Convention of the Second International Peace Conference at The Hague in 1907. It is to be noted, however, that even under the stipulation of the Treaty of 1794 with Great Britain the United States was to prohibit the enlistment only of citizens, not the enlistment of any person within the United States.

However proper and appropriate it may have been, therefore, to enact Section 2 of the American Neutrality Statute of 1794 to vindicate the sovereignty of the United States, it is clear that this section of that Act was not passed to enforce the obligations of any treaty stipulations to which the United States were then a party, or to enforce their duties as a neutral under the law of nations, as that law was then developed by custom.

When the American Neutrality Statute was codified in 1818 it had not then become a principle of international law that it was the duty of a neutral to prohibit the enlistment on its territory of persons for foreign service with a belligerent. Indeed as late as the Crimean War we find Great Britain using foreign legions of Germans,

Italians, Turks and Portuguese without any international difficulties being raised in connection therewith. Obviously, therefore, any rule which would require a neutral to suppress recruiting on its territory for belligerents had not then been established by custom. Nor outside of the provisions of that article (Article XXI) of the Treaty of 1794 with Great Britain, above referred to, which expired by limitation October 28, 1807 was any such obligation assumed by the United States in any treaty to which it was a party prior to 1871.

In 1871, however, the Treaty of Washington between Great Britain and America was negotiated under which a tribunal of arbitrators was provided for to meet at Geneva to pass on the American Alabama claims. By Article VI of that treaty, it was provided that the arbitrators should be governed by three rules, which it was agreed upon between the contracting parties were the rules to be taken as applicable to the case. The second of these rules reads as follows:

> "Secondly, *not to permit or suffer either belligerent to make use of its ports or waters* as the base of naval operations against the other, or *for the purpose of* the renewal or augmentation of military supplies or arms or *the recruiting of men*" (italics ours).
>
> *1 Malloy's Treaties, etc.,* 703.

This very Article VI, however, contained the following very significant paragraphs:

> "Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in

> order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.
>
> And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."

It is clear, therefore, that Great Britain assented to the rules referred to wholly for the purposes of the settlement by arbitrators of the dispute arising out of the Alabama claims, and did not recognize those rules as rules then established by international law. In fact, it is also apparent that if the rule of international law must be founded upon custom or upon treaty, that the United States Government also recognized that the rules set forth in the Treaty of Washington had not been established as rules of international law by the custom of nations, because in the article quoted the United States Government agrees with Great Britain to observe those rules as between themselves in future and to urge their acceptance upon other maritime powers, a stipulation which would be entirely unnecessary if the rules had then been recognized as binding rules of international law by other maritime powers. So that however binding these rules referred to in the Treaty of Washington may have been upon the United States and Great Britain thereafter, they cannot yet be said to be the rules of international law upon the subject, (1) because, to become such, they must be accepted by the

common consent of the nations, evidenced by custom or usage, or created by treaty stipulation, and (2) because, as said by Chief Justice Marshall in *The Antelope,* 10 Wheat. 66, 122:

> "No principle of general law is more universally acknowledged than the perfect equality of nations * * *. It results from this equality, that no one can rightfully impose a rule on another. * * * As no nation can prescribe a rule for others, none can make a law of nations."

It is to be noted, too, that under these rules it was only the ports or waters of a neutral which it was the duty of the neutral not to permit a belligerent to make use of for the purpose of the recruitment of men. Before 1876, as we shall later show, the United States had taken the position that these rules were no longer binding, because of Great Britain's failure to join with the United States in securing thereto the assent of other powers.

Upon the adoption of the Revised Statutes in 1874 the sections thereof on neutrality were taken from the American Neutrality Act of 1818 without material change. Section 5282 United States Revised Statutes (now 10 Fed. Pen. C.), formerly Section 2 of the Act of 1818, and originally Section 2 of the Act of 1794, underwent no change of phraseology as the result of the rules proclaimed in the Treaty of Washington.

Why should the Congress in codifying the Neutrality Act of 1818 into the United States Revised Statutes fail to profit by the example set by the superior legislation of Great Britain in 1870? Among the three rules pre-

scribed by the Treaty of Washington is one that it is the duty of a neutral "not to permit or suffer either belligerent to make use of its ports or waters * * * for the purpose of * * * the recruitment of men". If Municipal Statutes are necessary to the performance of this duty, and if recruitment is to be understood in a loose and very general sense, the Foreign Enlistment Act of Great Britain of 1870 would furnish a far more satisfactory opportunity to Great Britain to observe its neutral duty imposed by the quoted portion of the aforesaid rule, than is afforded to the American Government by Section 10 of the American Federal Penal Code. The use of the word "induce" in the British Act is much more far-reaching and covers a wider field of conduct than could possibly be embraced within the meaning of the terms "hire or retain" found in the American law. It cannot be asserted that the British statute of 1870 was passed to aid Great Britain in the performance of the obligations assumed by the rules declared in the Treaty of Washington of 1871, because the British statute was passed before those rules were agreed to, and was enacted rather with a view to shaping Great Britain's conduct in the course of the Franco-Prussian War than with a view of anticipating any rules which Great Britain might be inclined to yield to in the effort to settle the American Alabama claims. It is to be noted that the rule referred to is declared in limited terms. It only interdicts the use of the ports or waters of a neutral for the purpose of the recruitment of men, it does not refer to the recruitment of men as the same might be accomplished other than through the use of the ports or waters of a neutral. It cannot be claimed that

this limitation in the declaration of the rule was not deliberately intended. On the contrary subsequent occurrences would indicate that the limitation was quite deliberate.

> "At the session of the Institute of International Law at Geneva in 1874 a report was made by a Commission. * * * which had been appointed to examine the three rules."
>
> *7 Moore's International Law Digest,* page 1068.

> "At the session of the Institute at The Hague in 1875 Bluntschli submitted a project of rules, with certain observations and proposed amendments presented by various members of the Commission."
>
> *Ibid* 1070.

As a result seven rules were adopted, the fourth of which reads as follows:

> *"The neutral state ought not to permit or suffer the belligerents* to make its ports or waters the base of naval operations against each other, *or their military transports to use its ports or waters* for renewing or augmenting their military supplies or their arms or *for recruiting men."*
>
> *Ibid* 1072, note (italics ours).

In this report the second rule of the Treaty of Washington is declared in a more definite and certain form. It appears that the recruitment of men referred to is such a recruitment as takes place in the ports or waters of the neutral and is associated with the recruiting of men on belligerent military transports in those ports or waters. It is apparent, too, that the rule in this form would not prohibit the exportation by individuals of arms or military supplies. This rule of the Treaty of Washington was, during the negotiations therefor, the

occasion of some misunderstanding. Before the exchange of the ratifications of the treaty a question arose as to the proper construction of the second rule.

> "In order to remove an objection which had been raised in England Mr. Fish declared that the President understood and insisted that the rule did not * * * prevent the open sale of arms or other military supplies in the ordinary course of commerce, and that the United States would in bringing the rules to the knowledge of other powers and asking their assent to them insist that such was their proper interpretation and meaning."
>
> *Ibid* 1074.

In a note sent by the British Government to the British Minister at Washington,

> "It was stated that the second rule was to be understood as prohibiting the use of neutral waters for the renewal or augmentation of military supplies when for the service of a vessel cruising or carrying on war or intended to cruise or carry on war against another belligerent, and not when the military supplies or arms were exported in the ordinary course of commerce. Mr. Fish proposed to substitute for this explanation the phrase he had previously used. Earl Granville objected to the word 'open' because it would seem to make the government responsible for clandestine sales. Mr. Fish intimated that he would be willing to omit this word, but strongly objected to the word 'exportation' in Lord Granville's draft. Lord Granville was willing to omit it."
>
> *Ibid* 1074, 1075.

If the second rule of the Treaty of Washington were to have the limited field of operation that the language would indicate, if the recruitment of men interdicted thereby was a recruitment of men on belligerent military transports, it is apparently in direct conflict with that exemption as to enlistments upon vessels of war in

favor of transient aliens found in 18 Federal Penal Code and found in every American Neutrality Statute from 1794 to 1909. And yet no effort to remove this inconsistency has ever been made by the Congress.

But while the rules of the Treaty of Washington may be binding upon Great Britain and the United States as between themselves, they have no further binding force. In the Treaty of Washington, Great Britain and the United States agreed to bring these rules to the knowledge of other maritime powers, and to invite them to accede to them. This, however, has never been done. The award at Geneva in favor of the United States was very unpopular in Great Britain and caused considerable dissatisfaction there.

> "It was the award at Geneva that served more than anything else to prevent the joint submission of the rules by the United States and Great Britain to the other maritime powers."
>
> *Ibid* 1075.

In 1873 the question of submitting the rules was revived by the United States and again in the spring of 1875. In 1876,

> "Mr. Fish endeavored to show that the responsibility lay with the British Government" (referring to the failure to submit the rules to other maritime powers) "and in this relation he had adverted to the fact that the same clause in the treaty which bound the contracting parties to observe the rules in future also obliged them to present the rules to other powers. 'The stipulation' said Mr. Fish, 'is regarded by the United States as indivisible so that a failure to comply with one part thereof may and probably will be held to carry with it the avoidance and nullity of the other'."
>
> *Ibid* 1075, 1076.

This brief analysis of the second rule of the Treaty of Washington and this brief history of what happened to this rule, and the hint contained in the representation of this Government to the British Government in 1876, doubtless entertained before that time, to the effect that this Government might regard the rules as not binding through the failure of Great Britain to co-operate with the United States in submitting them to other powers, probably explain why the Congress in 1874 did not deem it necessary to modify or re-define or enlarge upon the offenses in the Neutrality Act of 1818 in codifying that Act into the United States Revised Statutes. The United Statutes Government may have been unwilling to deem itself bound by rules to which only it and Great Britain were parties unless the other maritime nations could be persuaded likewise to assent thereto. It is for this reason, probably, that the Congress was not disposed in 1874 to modify the American Neutrality Statute after the model of the British Foreign Enlistment Act of 1870.

The plain fact is, that the Congress in 1794 assumed obligations upon the part of the United States under international law in advance of any obligations that were imposed on them by international law (*Hall's International Law*, page 616). And while the advanced position then taken may in many respects be now a position which the nations have agreed to recognize as but only assuming obligations now required by international law, the further fact is that, prior to 1907, it was not recognized as a principle of international law

that a neutral country was obliged to prohibit the enlistment of men on its soil by a belligerent.

It is significant that the position taken by the United States Government in the Treaty of Washington in 1871 did not go so far as to impose upon a neutral the duty of prohibiting generally the recruitment of men on its soil by a belligerent, but only required the prohibition of the use of its ports and waters for that purpose. Nor can it escape attention that even going so far as the United States did in the Treaty of Washington it appeared to be necessary to have the rule agreed to, prior to submitting the Alabama claims to the Geneva Arbitration Tribunal, lest, perhaps, if such a rule had not been agreed to in advance by the parties to the arbitration, the Geneva Tribunal might have otherwise decided with reference thereto.

In December 1884, President Arthur in his message to the Congress recommended

> "That the scope of the neutrality laws of the United States be so enlarged as to cover all patent acts of hostility committed in our territory and aimed against the peace of a friendly nation".
>
> *8 Messages & Papers of the Presidents* 241.

The message evidently fell upon deaf ears for nothing was done. In 1897 by an Act of the Congress a commission was authorized to revise and codify the criminal laws of the United States and to make such changes of substance therein as they might deem advisable. The commission some years later made its report and on the basis thereof bills to codify and revise the criminal laws of the United States were introduced in Congress, which resulted in the Federal Penal Code of 1909 (Vol.

42 Congressional Record, Part 1, pages 724, 725). The committee which had the preparation of the bill, except in a few instances, preferred to merely codify and revise existing law without changing or adding to the substance of existing law, and this was absolutely true of that chapter of the Penal Code defining offenses against neutrality (ibid 726, 728, 729). It is clear, therefore, that from 1794 to 1909, when it came to defining offenses against the United States as they were related to foreign enlistments, the Congress was during all that period content to prohibit the hiring or retaining of persons to go out of the country with intent to be enlisted in foreign service, and to stop short with that prohibition, though the British models for legislation upon this subject had clearly indicated that there was conduct in connection with such foreign enlistments which the American Acts failed to penalise.

The duty of a neutral to prohibit the levying of troops on its territory for foreign military service by belligerents, was for the first time formally and generally asserted in 1907. By the convention respecting the rights and duties of neutral powers and persons in war on land of the Second International Peace Conference at The Hague in 1907, in designating the duties of neutrals, Article IV provided:

> "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents."

And Article V provided:

> "A neutral power must not allow any of the acts referred to in Articles II to IV to occur on its territory."

2 Malloy's Treaties, etc., pages 2297, 2298.

But this convention, though the United States and other powers are parties to it, is of no binding force in the present European War. By Article XX of that convention, it is provided:

> "The provisions of the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention."
>
> *Ibid,* page 2300.

As Great Britain, Italy, Servia and Bulgaria, of the belligerents in the present European War, are not parties to this convention, not having ratified the same, or assented thereto, the convention by its own terms has no binding force upon any of the parties to it during the present European War. But assuming its binding force it was not until 1907 that the Congress could have felt obligated by reason of any duties imposed upon a neutral under international law to prohibit the recruitment of men on the territory of a neutral in the interests of a belligerent; and the Congress may well have felt that the prohibitions of our neutrality law against the beginning, setting on foot, the providing or preparing the means for any military expedition or enterprise to be carried on from the United States against the territory of a friendly state, and against the enlistment or hiring or retaining of men to enlist, or hiring or retaining of men to go beyond the limits of the United States with intent to be enlisted in foreign service, met the neutral obligations of the United States as they were declared in The Hague Convention. The commencement of a military expedition with or without enlistment on the territory of a neutral, may well be likened to the

opening of recruiting agencies on the territory of a neutral. So, too, the enlisting of men on the territory of a neutral or the hiring or retaining of them there to enlist, or the hiring or retaining of them there to go beyond the territory of the neutral with intent to be enlisted in foreign service, may also be likened to the opening of recruiting agencies on the territory of a neutral. But the mere aiding, assisting or persuading of men to go beyond the limits of a neutral with intent to enlist cannot be compared to the opening of recruiting agencies on the territory of a neutral, because the act of recruiting implies the act of hiring or entering into a contract or agreement with the party hired relative to enlistment.

For instance, it is the custom in the American military service to secure recruits after the following manner. General recruiting stations are established at different points "at which applicants for enlistment are examined and from which, if found to be qualified for service, they are forwarded to recruiting depots for final examination and enlistment" (U. S. Army Regulations, Par. 841 (1913)). Men are not actually enlisted at these general recruiting stations (U. S. Army Reg. 847). The applicant for enlistment first executes a formal declaration or application for enlistment (U. S. Army Reg. 853). If the applicant is accepted for enlistment he is then furnished transportation from the general recruiting station to the recruiting depot or recruiting depot post (U. S. Army Reg. 1115). If after examination at the recruiting depot or recruiting depot post the applicant is acceptable he is then enlisted and

signs an enlistment contract in the form of an oath (U. S. Army Reg. 855).

Here we see the steps taken in recruiting. First, there is the formal application to enlist and its acceptance. This is a contract or agreement to enlist and is not the enlistment itself. Second, there is a contract of enlistment; this is the enlistment itself. When an applicant has made application to enlist and his application to enlist has been accepted, he may be said to have been hired or retained to enlist, and when this applicant for enlistment is finally passed and signs his enlistment paper he has then executed his contract of enlistment and may be then said to have been hired or retained as a soldier. There are thus two separate and distinct contracts of hiring.

The distinction noted between the contract *to enlist* and the contract *of enlistment* is clearly recognized in Section 10 Federal Penal Code and in the preceding sections upon which it was founded because that section not only prohibits enlistment in the United States, but prohibits the hiring or retaining of persons to enlist, as well as the hiring or retaining of persons to go beyond the limits of the United States with intent to be enlisted in foreign service. Now there are many acts by which a person in the United States might be secured as a soldier in foreign service that would fall short of this system of recruitment or anything like it. A man going abroad on his own volition, for instance, cannot be said to have been recruited in the United States. A man assisted to go abroad, or a man urged to go abroad, or persuaded to go abroad, by any means

short of a contract hiring him to enlist or to go abroad with intent to be enlisted, though he actually went abroad with the intent to enlist could not be said to have been recruited in the United States, because he left there under no obligation to enlist, whatever, and if places were established where aid and assistance were given to those seeking to go abroad on their own volition, and such aid were given without imposing any obligation on the party assisted to enlist or to leave the country with the intent to enlist, those places could not be characterized as recruiting agencies.

The French text of The Hague convention, which is treated by the United States Government as of equal authority with the English text, as both texts are published for the guidance of the Army and Navy (Hague & Geneva Conventions, U. S. Navy Dept. 1911, p. 70; Rules of Land Warfare U. S. War Dept. 1914, p. 166), reads as follows:

> "Des corps de combattants ne peuvent être formée, ni des bureaux d'enrôlement ouverts. sur le territoire d'une Puissance neutre au profit des belligérants."

Here, too, the use of the term "bureaux d'enrôlement" implies that not only has the recruit been enrolled but obligated, because enrolment without obligation could not be an "enrôlement au profit des belligérants".

Clearly the plain letter of the Federal Penal Code is sufficient to enable the United States to discharge its obligations as a neutral as defined under The Hague Convention which imposes upon it the duty of prohibiting the opening of recruiting agencies in this country to assist a belligerent, or as asserted in the French text,

"bureaux d'enrôlement au profit des belligérants". For our neutrality statute covers, though it is limited, to acts of recruitment, in prohibiting here the enlistment or the hiring or retaining of men to enlist or to go beyond the country with intent to enlist. And these considerations, we believe, are those which have persuaded the Congress to make no change in our neutrality statute so far as foreign enlistment is concerned. "The procuring", "the attempting or endeavoring to procure", "the inducing", of the British statutes were deliberately rejected or deliberately disregarded, because those words went further and prohibited a group of acts which it was not and never has been an obligation of a neutral to prohibit. As illustrating the American attitude upon the subject, during the Franco-Prussian war twelve hundred Frenchmen left New York City for France on two boats; it was generally understood that these men were going home to enlist in the French army; the same vessels carried 9600 rifles and eleven million cartridges. Mr. Fish took the position that this was not a hostile expedition as the men were not organized or drilled and, therefore, it was not the duty of the United States to prevent their departure. The position there taken is approved by *Hall in his International Law,* page 631. During the same war Germans were sent from this country to Germany for military service, without objection on the part of the United States (*Woolsey International Law,* page 289 note, 6th Edition). And during the present war the nationals in this country of all the belligerents except Great Britain have freely returned home from the United States

for military service and have been aided and assisted thereto by their respective consular and diplomatic officers here (Trans. p. 111; par. 54).

It should further be remembered, throughout the analysis of this legislation, that what is being dealt with here is a penal statute. We need not cite authority to support the proposition that a penal statute of this character is not to be enlarged by implication, or extended to cases not obviously within its language; we do not conceive that authority should be cited to sustain the proposition that such a statute should be closely adhered to as written, and that to adopt the language of Chief Justice Fuller it should be applied only to those who are plainly and unmistakably within its terms. If any authority be needed on this subject matter, the following may be consulted.

We believe that the subjoined authorities will fully support the proposition that this penal legislation must be taken as it is written, without addition thereto, or subtraction therefrom; it is to be tested by its own terms; neither its terms, purpose nor meaning can be extended or limited by implication or construction; and its scope is to be determined by its langauge and by that only.

Hamilton v. Rathbone, 175 U. S. 419-421;
New Orleans v. Warner, id. 146;
Bate Ref. Co. v. Sulzberger, 157 id. 1;
McBroom v. Scot, Mort. Co., 153 id. 318, 323;
Minnesota v. Barber, 136 id. 320;
Henderson v. R. R., 123 id. 61;
U. S. v. Parker, 120 id. 89;

Soon Hing v. Crowley, 113 id. 703, 710;
Bond v. Dustin, 112 id. 604;
U. S. v. Wiltberger, 18 id. (5 Wheat.) 95, 96; Marshall, C. J.;
Weber v. St. P. C. Ry., 97 Fed. Rep. 140;
Shreve v. Cheseman, 69 id. 692;
Knox County v. Martin, 68 id. 789;
U. S. v. Clayton, 2 Dill, C. C. 224-226;
Reg. v. Turk, 10 Q. B. 544; Denman, C. J.;
Henderson v. Sherbourne, 2 M. & W. 239; Tenterden and Abinger, J. J.;
Melody v. Reab, 4 Mass. 473; Parsons, C. J.;
Com. v. Martin, 17 id. 362; Parker, C. J.;
Cleveland v. Norton, 60 id. 380; Shaw, C. J.;
Anderson v. R. R., 42 Minn. 490;
Ex parte McNulty, 77 Cal. 168;
Tynan v. Walker, 35 id. 634;
City of Eureka v. Dias, 89 id. 469-470;
Mills v. Land Co., 97 id. 254;
In re Walkerly, 108 id. 655;
In re Wong Hane, id. 682;
Cline v. State, 36 Tex. App. 320;
Rich v. Kaiser, 54 Pa. St. 86, 89.

And the principles of statutory construction for which we are contending, are applicable and have been applied to neutrality laws. The rule upon the subject is thus stated in *Cyc.:*

> "The neutrality act is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. It is a criminal and

> penal statute, and is not to be enlarged beyond what that language clearly expresses as being intended."
>
> *29 Cyc.,* 678, "2 Construction".

And as further supporting this principle of construction, see the reasoning and decision in

Ex parte Orozco, 201 Fed. 106.

And in a very well considered case decided in the Court of Exchequer, views were expressed which we consider to be pertinent upon the point of view which should be taken of this legislation. The case was that of the "Alexandria", a ship built in Great Britain and seized by the customs authorities of the Port of Liverpool as being built for the Confederate States and intended to be used by them as a ship of war, although not fully equipped as a ship of war. The proceedings were had under the Foreign Enlistment Act of 1819, and Pollock, C. B., after stating that the question which arose was, what is the true construction of the Foreign Enlistment Act, goes on to describe that Act as being "a highly penal statute". After repudiating the thought that in the consideration of a penal statute an equitable construction has any place (star p. 509) the learned judge, referring to the remark of Mr. Justice Blackstone that

> "The freedom of our constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter,"

proceeds to add

> "Our institutions were never more safe in my opinion than at the present moment, but we cannot afford at any time to lose any of the grounds of our security, and

no calamity would be greater than to introduce a lax or elastic interpretation of a criminal statute to serve a special but temporary purpose."

The learned judge further observes that

"the distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is: What is the true construction of a statute? If I were asked whether there be any difference left between a criminal statute and any other statute not creating a crime, I should say that in a criminal statute you must be quite sure that the offense charged is within the letter of the law. No doubt there are some other cases to which the statute is to be applied, unless you are quite sure of the contrary, namely, that the case is not within the law. * * * So, also I think that we have nothing to do with the political consequences of our decision, or the dissatisfaction which it may create in any quarter anywhere, and I cannot help expressing my regret, not unmixed with some surprise, that the learned attorney-general has more than once adverted to the consequences that may arise from our holding that what the defendants have done is not contrary to our municipal law * * * In construing the statute, it is our duty to ascertain the true legal meaning of the words used by the legislature and to collect the intention from the language of the statute itself, either the preamble, or the enactments, and not to make out the intention from some other sources of information and then construe the words of the statute so as to meet the assumed intention; and this appears to me to be the mistake of the counsel on the part of the Crown. They say, 'Here is a powerful state complaining that what you are doing is as bad as war', and saying 'We will not endure it'; and then they say 'The welfare and peace of this country require that the Act should be so construed as to silence that complaint'. But we cannot and ought not, even if the matter before us seemed to be within the mischief which it is supposed the statute meant to remedy, to deal with it as a crime unless it be plainly and without doubt included in the language used by the legislature."

And so, likewise, in the same case, it is observed by Baron Bramwell, who concurred in the opinion of the Chief Baron:

> "It may be said that this is a lawyer's mode of dealing with the question, merely looking at the words. It is so, and I think it right. A judge, discussing the meaning of a statute in a court of law, should deal with it as a lawyer and look at its words. If he disregards them and decides according to its makers' supposed intent, he may be substituting his for theirs, and so legislating. As has been excellently said, 'Better far be accused of a narrow prejudice for the letter of the law, than sit up and sanction vague claims to discard it in favor of some higher interpretation more consonant with the supposed intention of the framers or the spirit which ought to have animated them'. Important as are the objects of that statute, it must be construed on the same principles as one regulating the merest point of practice or other trifling matter."

In the course of the argument in this cause, on behalf of the defendants, it was said that

> "It is a wrong mode of construing a penal statute to extend its provision beyond what the legislature intended, because it may by possibility be evaded. Evasion means avoiding the commission of the offense, and why should a man be punished for avoiding committing it? And in this connection, counsel referred to the following passage in a note written on October 16. 1862, by Lord Russell to Mr. Adams. the American Ambassador. acknowledging the receipt of certain evidence as to the gun boat Alabama, —'With reference to your observations with regard to the enfringment of the enlistment Act, I have to remark that it is true that the foreign enlistment Act, or any other Act of the same purpose. can be evaded by very subtle contrivances; but Her Majesty cannot on that account go beyond the letter of the existing law'."

And no doubt, Baron Bramwell had this thought in mind when he remarked:

"What I wish is to show that in considering this as a matter of principle, I have borne in mind, first, that the present law is capable of easy and mischievous evasion; and secondly, that if it is sought to extend it by construction, it is impossible to stop short of the prohibition of the export of contraband of war generally; though, thirdly, a positive law so stopping would not be difficult of enactment * * * I have no doubt that the vessel was building and equipping for the Confederates, and in order that they might use her, when already armed and equipped for hostilities, against the Federals. This was being attempted, but I see no evidence that it was intended to arm or equip her in the Queen's Dominions so as to be capable of attack or defense. On the contrary, I believe it was intended to evade, not infringe the statute, not to commit a misdemeanor nor to do or attempt to do what would cause a forfeiture of the ship. I believe on the evidence that it was intended to deal with this vessel as with the Alabama, viz: to get her out of the country, and to give her her warlike equipment and armament out of the Queen's Dominions."

The result was that the rule *nisi* granted the Attorney-General for a new trial was discharged. Thereafter the Crown appealed to the Exchequer Chamber against the decision of the Court of Exchequer in discharging the rule for a new trial; but in the Court of Exchequer Chamber, the appeal was dismissed, the judges being of opinion that the provisions of the common law procedure Act of 1854 as to appeal did not apply to the revenue side of the Court of Exchequer. Thereafter, the Crown appealed to the House of Lords; but there, the ruling of the Court of Exchequer Chamber was affirmed, and the appeal was dismissed with costs.

Attorney-General v. Sillem, 2 Hurl. & Colt, 431, 579, 1022.

There can, indeed, we submit, be no reasonable doubt about the rule that if the conduct ascribed to the defendants does not come clearly within the terms of the prohibition of the statute, the scope of the statute will not be extended to include any other conduct than that which is clearly described and provided for; and where it is not entirely clear that the ascribed conduct is embraced within the terms of the prohibition of the statute, the doubt must be resolved in favor of the defendant.

U. S. v. Delaware, etc., Co., 213 U. S. 366;
Chase v. Curtis, 113 U. S. 452;
U. S. v. Ragsdale, 27 Fed. Cas. No. 16,113;
U. S. v. Clayton, 25 id. No. 14,814;
Railroad Co. v. U. S., 188 Fed. 191; 213 id. 162, 169;
U. S. v. Van Wert, 195 id. 974;
Erbaugh v. U. S., 173 id. 433;
Bank v. U. S., 206 id. 374;
Field v. U. S., 137 Fed. 6;
The Ben R., 134 id. 784;
In re McDonough, 49 id. 360;
U. S. v. Starn, 17 id. 435;
French v. Foley, 11 id. 801.

And, moreover, it has never been doubted that an appeal may be made to the consequences of a proposed construction, in denial of that construction; that is to say, in the construction of a statute, considerations arising from the inconvenience, absurdity, injustice, or prejudice to the public interests resulting from a proposed construction, may always be considered

(*Knowlton v. Moore,* 178 U. S. 41; *The Chinese Laborers on Shipboard,* 13 Fed. 291; *In re Generator Co.,* 175 Fed. 825; *Pennington v. U. S.,* 231 U. S. 631). But something has already been said concerning the gross injustice to be found in the unjust discrimination against Great Britain which would attend the construction of this penal statute contended for by the other side; and in connection with those suggestions, it may be well, in the light of the rule just referred to, to call attention to the following expression of opinion on this subject by the Attorney-General of the United States on page 26 of his printed memorandum of law, on the construction of Section 10 of the Federal Penal Code. There, Mr. Charles Warren, the Assistant Attorney-General, takes occasion to say:

> "If, however, by the law of his country, every reservist after his active service constitutes at all times an existing part of the military service of his country, and if upon his return he is not obliged to take any formal step of the nature above outlined (that is to say, enrolling, or enlisting, or entering himself or taking any oath), if he simply resumes his place in the ranks as would a soldier 'on leave', his recall for service, whether accompanied by payment or consideration in the nature of hire, can in no sense be deemed a violation of American Law. There is no enlisting or entering himself, inasmuch as he is already enlisted so far as he ever can be. There is no hiring or retaining to enlist or enter himself, for it is not possible so to hire or retain a man who is already enlisted and entered."

and he then cites the Germans as a "class of persons to whom the statute is not applicable."

Would it, then, be a crime, within the terms of this penal statute, to furnish the means or ability to a reservist, who happened to be in this country, so that

he might return to report for duty as a soldier? If a reservist be within the United States, but financially unable to return to his regiment, would one who assisted him so to return be guilty of a violation of this section of the penal code? And why, therefore, should a German or French sympathizer within the United States be permitted to furnish financial assistance to German or French reservists, thus enabling them to return to their regiments, without the slightest concealment of their intentions and purposes, without committing any violation of this section of the penal code? And why, upon the other hand, should a British sympathizer, helping home a British subject who was under no sort of obligation to enter the military service of Great Britain, be guilty of a violation of this section of the penal code in a case in which he has no knowledge of the intention or purposes of such return of such British subject, but merely supposes, believes or presumes that the British subject will enlist in the military service of Great Britain? Is not such a consequence as this precisely the sort of consequence which should operate any denial of the construction proposed here by the government of the United States? How can such a construction as this be squared with the thought of impartial conduct towards all parties belligerent? Why should the French and German governments be permitted by us to help home their reservists while, at the same time, we deny to the British government the right to render financial assistance for the return of its own people who are not placed under any obligation to enter its military service? How can a construction be sustained or supported which thus dis-

criminates against the solitary European government which has no compulsory military service law, and in favor of those European governments which enforce compulsory military service? How can a construction which is responsible for such a consequence as this be treated gravely as a construction making for neutrality? How can it be reconciled with Judge Ross's definition of neutrality in the *Turnbull* case?

And the limited scope of the statute under consideration may be further illustrated by considering for a moment what has been adjudicated to be not an offense under it. Of course, our statute is in terms much narrower in scope than the statutes from which it took its origin; while they speak of hiring, engaging, retaining and procuring, our statute is limited in scope to the thought of hiring or retaining alone; and when one comes to consider what acts have been adjudicated not to be violations of our neutrality laws, one is again struck by the haphazard and illogic character of the legislation whereby minor acts are pitched upon, while serious acts go untouched; and one is helped to understand why Attorney-General Gregory is making his present application to the present Congress for improved and enlarged legislation upon this subject. In speaking of the assistance which is given to the proper understanding of a statute of this character by a consideration of what is not a violation of it, the following language of Chief Baron Pollock, would seem to be impertinent:

> "In endeavoring to discover the true construction of the seventh clause of the statute, the first matter to be attended to is no doubt the actual language of the clause

itself as introduced by the preamble; secondly, the words or expressions which obviously are by design omitted; and thirdly, the connection of the seventh clause with other clauses in the same statute, and the conclusions which on comparison with other clauses may reasonably and obviously be drawn. I do not mean to exclude other circumstances, but these appear to me to be the most obvious and the safest. The learned Attorney-General, with apparent effect, asked 'Why do you try to explain a statute by words which are not to be found in it? It is dangerous to adopt such a course'. On the first impression the objection seems not at all unreasonable; but the answer, on a very little consideration, is quite obvious. In order to know what a statute *does* mean, it is one important step to know what it *does not* mean; and if it be quite clear that there is something which it *does not* mean, then that which is suggested or supposed to be what it *does* mean, must be consistent and in harmony with what it is clear it *does not* mean. What it *forbids* must be consistent with what it *permits*" (italics ours).

Attorney-General v. Sillem, supra, pp. 515, 516.

And certainly it cannot be seriously contended that a knowledge of what is not prohibited under this section of the penal code does not help us to define and limit the prohibitions of the statute. It is, therefore, proper again to call the attention of the court to the adjudicated proposition that it is not an offense under the neutrality statute to leave the United States to enlist in foreign military service.

Wiborg v. U. S., 163 U. S. 632;
U. S. v. Hertz, 26 Fed. Cas. No. 15,357;
U. S. v. Kazinski, 26 Id. 15, 508;
U. S. v. Nunez, 82 Fed. 599;
U. S. v. O'Brien, 75 Id. 900.

Persons may depart together to enlist in foreign military service, so long as they do not constitute a

military expedition or enterprise within Section 5286 of the Revised Statutes, now Section 13 of the Federal Criminal Code.

U. S. v. O'Brien, supra;

U. S. v. Nunez, supra, and see the phrase "Military expedition or enterprise defined": 5 Fed. Stat. Ann. 370-374.

It is also settled that the intention to enlist after reaching the foreign country does not make an expedition unlawful which is otherwise lawful.

Generally, a wrong motive does not make unlawful a lawful act, as Mr. Justice Hunt says:

> "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached."

Doyle v. Continental Ins. Co., 94 U. S. 535, 541;

U. S. v. O'Brien, supra;

U. S. v. Nunez, supra.

The transportation of persons leaving to enlist is no offense, if not a "military expedition or enterprise".

U. S. v. Kazinski, supra;

U. S. v. O'Brien, supra; 5 Fed. Stat. Ann. 374 1st column, middle;

In the Hertz case, supra, it was said:

> "Before a jury can properly convict an individual of the commission of a crime they must be satisfied, by clear evidence, that the crime has been committed by some one. We have no statute which affects to punish braggart garrulity; and, unless the particular offense of enlisting certain definite persons has been committed by Perkins, one of the defendants, though he may have proclaimed upon the housetops that he has recruited armies innum-

> erable, no jury can properly convict him of the offense he professes to have engaged in" (page 294).

And so in the *Kazinski* case, the learned judge said:

> "A distinct hiring or retaining by the defendants must be shown. It might be done through agents, but these agents must be shown to be agents for this purpose and acting under the defendants. There is nothing here to show these defendants were not the agents of the persons sent on here under Kaufman. They might have wished the defendants to produce them a passage, or the means of going out of the jurisdiction to enlist. If a captain of a vessel should know that all his passengers were going out of the United States for the purpose of enlisting, or were hired or retained to go, he would not be liable; he is as much the agent of the person hired as the one hiring, and he might have the knowledge and commit no offense. It would be no crime to obtain a ticket or hire a cab for the person who was hired or retained to go beyond the limits of the United States to enlist" (page 685).

And so, also, in the *Wiborg* case, supra, it was contended that persons are not prohibited from going abroad for the purpose of enlisting in the service of a foreign army; and that the transportation of arms, ammunition, and munitions of war, from this country to any other foreign country, is not unlawful; and therefore that no effense was committed in the transportation of men, arms, and munitions; no fault was found by the Supreme Court with this contention; and in that connection, the Supreme Court observed:

> "The District Judge ruled nothing to the contrary and charged the jury in this case that it was not a crime or offense against the United States under the neutrality laws of this country for individuals to leave the country with the intent to enlist in a foreign military service, nor was it an offense against the United States to transport

> persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies; that it was not an offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any foreign country, whether they were to be used in war or not; and that it was not an offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip" (pages 652-3).

And these instructions were approved by the Supreme Court (page 654).

(B) Section 37. This is the familiar section dealing with the subject matter of conspiracy; and in approaching the question whether the present plaintiffs in error did "unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together" to commit an offense against the United States, it is proper to point out that a charge of crime against the United States must have a clear legislative basis *(U. S. v. Smull,* 236 U. S. 405); and therefore, as there is no such thing as a common law offense against the sovereignty of the United States, the federal courts can punish only such combinations as are made punishable by statute. By Section 37 of the Criminal Code, it is in general terms made a punishable offense for two or more persons to conspire to commit any offense against the United States; but the object of such conspiracy must be to commit some offense against the United States in the sense only that it must be to do some act made an offense by the laws of the United States *(Scott v. U. S.,* 130 Fed. 429; *U. S. v. Lyman,* 190 id. 414). Resort must therefore necessarily be had to other provisions of the

laws of the United States; because, from the very nature of the offense alleged, it is apparent that the law of conspiracy, especially as invoked in this cause, is dependent upon other provisions of the United States laws for its application, as in itself it affords no definite standard by which the legality of objects, means or conduct may be judged. That is to say, under Section 37, these plaintiffs in error were accused of conspiring to commit an offense against the United States; but to understand what that offense may be, we must go elsewhere,—we must resort to Section 10.

Under these two sections, then, the question arises whether this Agreed Statement of Facts shows, beyond all reasonable doubt that these defendants criminally conspired to violate Section 10, that there was a real agreement and concert among them to commit this offense, that such an agreement and concert were inspired by the criminal and specific intent required, and that these elements were followed up by overt acts designed to further the object of the antecedent conspiracy.

It may not irrelevantly be remarked that in cases of this class, criminal agreement is the basis of the charge of conspiracy,—not mere agreement, but agreement criminal under the statutes of the United States. There is no such legal concept as conspiracy in the abstract; the thought is essentially relative and concrete; and so well recognized is this that, under Section 37, the mere conspiring is not criminal. Under Section 37, a voluntary combination of men has in it no element of evil which infects with indictability acts in themselves not

indictable under other specific statutory provisions. On the contrary, in federal criminal jurisprudence, and under Section 37, voluntary combination is indictable or not just as the conduct which it involves is statutorily indictable or not. In other words, men may voluntarily combine without being guilty of conspiracy, as when they combine themselves into corporate or non-corporate associations of all kinds; the combination becomes criminal only when the conduct which it involves is criminal; it is the criminal nature of the concerted purpose which imparts to the combination its criminal character; and here, the alleged criminal and concerted purpose is claimed to have been the hiring and retaining of these men to go abroad for enlistment in a foreign military service.

It should further be remarked that, in the law of conspiracy, the criminal agreement must involve concerted action. Mere individual intentions or purposes possess no significance; many men may, without any concert whatever, desire the attainment of the same object and labor to achieve it, but no one would call that a conspiracy, and it would be a distortion of language to do so; because, while there may have been the same purpose or intention held independently in the mind of each, yet those independent intentions or purposes never coalesced into any concert. And that this concerted action is an ingredient of conspiracy, is the view of the Supreme Court, which defines conspiracy thus:

> "A conspiracy is a combination of two or more persons, *by some concerted action,* to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in

itself criminal or unlawful, by criminal or unlawful means."

Pettibone v. U. S., 148 U. S. 203.

In other words, to adopt the language of the indictment in the present cause, there must be a "corrupt" agreement to commit an offense against the United States. The corrupt agreement must be a real agreement, however proved. Mere knowledge by each party concerned of the other's purpose, together with acquiescence in that purpose, would not be enough to satisfy the law *(8 Cyc.,* 621; 5 R. C. L. 1063; *1 Wharton Crim. Law.,* Ed. 1912, Sec. 266, n. 2; *1 Wharton Crim. Evid.,* Ed. 1912, page 922, n. 4, 5; *U. S. v. Lancaster,* 44 Fed. 896; *Marrash v. U. S.,* 168 Id. 225; *Patterson v. U. S.,* 222 id. 599; *People v. Woodward,* 45 Cal. 293); and before any conviction can result, such real agreement must be established beyond all reasonable doubt.

And it should be added that the existence of a conspiracy is not established by evidence of subsequent conditions which are consistent with its existence *(Waters-Pierce Oil Co. v. Van Elderan,* 137 Fed. 557, 571). In other words, resort cannot be had to an alleged overt act to prove the conspiracy. You cannot argue back from the overt act to the prior conspiracy from which it sprang. The conspiracy itself is the foundation for, and source of the subsequent, independent overt acts, and you cannot infer from my participation in the overt act that I was a conspirator,—you must prove me to have been a conspirator, by independent evidence. Indeed, in no case, can acts occurring after the conspiracy is formed be referred to for the purpose of proving the

7. There must have been consummated, within the United States, a distinct hiring and retaining.

8. Such hiring and retaining must be one hiring the person hired and retained to go beyond the limits or jurisdiction of the United States; thus a hiring and retaining to go from San Francisco to New York would not be a violation of this statute, because there would be no intent that the men hired and retained should go beyond the United States.

9. Such hiring and retaining must be to go abroad with a specific intent and for a specific purpose, viz.: to enlist in a foreign military or naval service of some foreign power then at war or in a state of war, with another foreign power, there being a state of peace between the belligerents and the United States.

10. Such hiring and retaining cannot be the product or independent or unilateral intents, but must result from a common or bilateral intent, known to, understood by, and participated in by both parties to the hiring and retaining. The claim made in the indictment is that the defendants were guilty of a corrupt and felonious conspiracy, prompted with the specific intent to hire and retain men for foreign military service; and it is this specific situation, and not the helping home of fellow subjects, which this record must establish with the stringency required in criminal causes before this judgment can be supported here. Sections 10 and 37 of the Penal Code prescribe the limits within which the activities of the lower court were restricted:

> "It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its

> authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms."
>
> *In re Bonner,* 151 U. S. 256, per Field, Justice.

As presented, this indictment accused five persons and one corporation; it asserted that they all conspired and confederated together; but this assertion was not verified, and on the hearing all of the defendants except Messrs. Blair and Addis were eliminated from the cause. As the verdict shows, the jury acquitted all of the accused persons except Messrs. Blair and Addis, and found the latter guilty upon the first count only of the indictment,—that is to say, guilty of a corrupt and felonious conspiracy prompted with the specific intent to hire and retain men in the United States to go abroad for foreign service as soldiers. In a word, as the result of the hearing, the case was whittled down to Messrs. Blair and Addis, and to the soldier count.

ERRORS ANTECEDENT TO THE TRIAL.

The lower court erred in denying the motions to quash the indictment and in overruling the demurrers to the indictment.

It appears from the transcript of record in this cause that motions to quash the indictment, and demurrers to the indictment were filed by the various defendants; and that each of these pleadings raised substantially the same objections to the indictment. The bill of exceptions shows that after argument, the motions to quash were denied, and the demurrers over-

ruled, the defendants below and plaintiffs in error here duly excepting to the rulings. These motions to quash and demurrers are set out at length in the transcript of record, beginning at page 19, and ending at page 56; and their underlying thought is that a legally adequate indictment is jurisdictional (*Ex parte Bain,* 121 U. S. 1).

An examination of the indictment will disclose that it fails to show that the Grand Jury which found it was ever impaneled, sworn or charged at any term of court. In all the standard forms of indictment, there is a direct recital that the Grand Jury was selected, impaneled, sworn and charged; in the indictment which was the subject of consideration in *Powers v. U. S.,* 223 U. S. 303, there was such a direct recital; but in the cause at bar nothing of that kind appears. Since the proceedings of a Grand Jury are secret, and no man may know until they come into court whether any indictment will be found, there is good reason for the ruling that whatever is essential in a criminal proceeding to deprive a person of his liberty must affirmatively appear, and nothing is taken by intendment or implication.

Ball v. U. S., 140 U. S. 118;
Ex parte Bain, 121 id. 1.

And in numerous cases it is held that a Grand Jury is not legally impaneled until sworn and charged, and that the indictment should show that these requirements were complied with (see the authorities collected in *22 Cyc.,* 217 n. 94).

It is also urged, against the indictment, that it fails to allege the existence of either a state of war or a state

of peace. It is submitted that Chapter 2 of the Federal Penal Code contemplates a state of war, and is designed to furnish rules of conduct operative during such state of war. Not only does the history of the legislation upon this subject-matter support this view, but the very definition of neutrality requires it. Thus, Prof. Lawrence in his *Treatise on International Law* (Boston Ed. 1898, Sec. 243, p. 473), tells us

> "Neutrality may be defined as the condition of those states which, *in time of war* take no part in the contest, but continue pacific intercourse with the belligerents."

Moore, in his *Digest of International Law* (Vol. 7, p. 860), citing the resolution 2 U. S. 19, 21, tells us that

> *"The idea of a neutral nation implies two nations at war, and a third in friendship with both."*

And so, likewise, Prof. Wilson, of Harvard University, in his *Treatise on International Law*, at page 385, states that

> "Neutrality is, in general, abstention by a state which is not a party to *a war* from all participation in *the war*, and may extend to the obligation to prevent, tolerate or regulate certain acts upon the part of the *belligerents*".

In an article contributed to *Cyc.* by the learned judge of the Admiralty Court of Canada, on the subject of neutrality laws (*29 Cyc.* 675, 676, 678), it is said that

> "Neutrality strictly speaking, consists in abstinence from any participation in a public, private or civil *war* and impartiality of conduct towards both parties. * * * *Neutrality relates solely to a state of war between two belligerent nations.* * * * The neutrality act is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. It is a criminal and penal statute, and is not to be

> enlarged beyond what the language clearly expresses as being intended".

And so, we are advised by Attorney-General Hoar (*13 Opinions Attorney-General,* 179), that

> "undoubtedly the ordinary application of the statute is to cases where the United States intends to maintain its neutrality in *wars between two other nations,* or where both parties to a *contest* have been recognized as *belligerents,* that is, as having a sufficiently organized political existence to enable them to carry on *war*".

And finally, it is declared by the Supreme Court (*U. S. v. The Three Friends,* 166 U. S. 1, 52), that

> *"Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and any impartiality of conduct toward both parties".*

And see the definition of Ross, J., in *U. S. v. Turnbull,* 48 Fed. 99, 105.

We have seen from our historical examination of the legislation upon this subject-matter, that the legal concept of neutrality is bound up with the existence of a state of war, that the various Neutrality Acts arose out of war conditions, and that the Act itself contemplates a state of war. In other words, we urge that there can be no violation of this Neutrality Act unless there be, at the time of such violation, a state of war between two or more nations with which nations the Government of the United States is at peace. We think that a fair reading of Chapter 2 of the Federal Penal Code, keeping in view the nature of neutrality, and the history of neutrality legislation, should convince any open mind that the chapter in question contemplates a state of

war; and we earnestly insist that no law of the United States can be produced which prohibits or makes punishable, during a state of peace, the hiring and retaining of men for foreign military or naval service. We are not concerned now with questions of proof; we are dealing solely with this indictment as a pleading.

But nowhere in this pleading has the pleader chosen to rely upon the existence of a state of war anywhere. Nowhere in this indictment, from the beginning to the end, is a single syllable to be found showing the pendency of a state of war anywhere; and so far as the allegations of this indictment go, the scanty matters sought therein to be alleged occurred in a time of the most profound peace.

It is, however, the fundamental rule of criminal pleading that the accused must be apprised of every ingredient of the alleged crime with which he stands charged; and this, so positively and distinctly as to leave nothing to intendment, implication or inference (*U. S. v. Cruikshank,* 92 U. S. 542). Another mode of expressing this same fundamental rule will be found in the doctrine that whatever is required to be proved at the trial must be charged in the indictment (*State v. Dale,* 64 A. S. R. 515). In the case last cited, it was said:

> "Every fact and modification of a fact which is legally essential to a prima facie case of guilt, must be stated. In order that a party accused may know what a thing is, it must be charged expressly and nothing left to intendment. All that is to be proved must be alleged. And the law, proceeding in that beneficent spirit which presumes innocence until guilt be established, will presume that what the indictment does not charge does not exist."

"It is not sufficient," indeed, "that the pleaders state merely the facts from which an offense can be implied, or only so many of the essential elements as in the ordinary experiences of life, or even in a statute, might suggest all the other elements, but he must state in terms everything necessary to constitute a criminal act. * * * In order to properly inform the accused of the nature and cause of the accusation, within the meaning of the constitution and of the rules ot the common law, a little thought will make it plain, not only to the legal but to all other educated minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates, as to place, persons, things and other details".

U. S. v. Potter, 56 Fed. 83; quoted at length 2 Foster Fed. Prac. 1662, et seq.

And the Supreme Court itself states the rule thus:

"The accused is entitled to be informed of the nature and cause of the accusation against him, and jurisdiction should not be exercised when there is doubt as to the authority to exercise it. All the essential ingredients of the offense charged must be charged in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defense and avail himself of his acquittal or conviction against any further prosecution for the same cause."

Ball v. U. S., 140 U. S. 118, 136.

Since, under *Ex parte Bain,* supra, a legally adequate indictment is jurisdictional, and since, in *Ball v. U. S.,* supra, in speaking of the requisites of an indictment, the chief justice observes that

"Jurisdiction should not be exercised when there is doubt as to the authority to exercise it,"

we have, we believe, a right of appeal to the rule, already recognized in *U. S. v. Potter,* supra, that it is not enough that the grounds of jurisdiction may be inferred argumentatively from the statements in the pleading, because jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth,—a rule fully approved in recent decisions of the Supreme Court.

Hull v. Burr, 234 U. S. 712;
Lovell v. Newman, 227 id. 412, 421;
Shulthis v. McDougal, 225 U. S. 561.

We think, therefore, that from the history of neutrality legislation, from the nature of neutrality itself, and from a full and fair consideration of Chapter 2 of the Federal Penal Code, which is headed "Offenses Against Neutrality", and of which Section 10 is part, it must result that because of the failure of this indictment affirmatively and distinctly to set forth the essential jurisdictional requisite of a state of war among nations with whom the United States is at peace, and without which state of war no "offense against neutrality" could occur, this indictment is fatally defective and wholly insufficient to support the jurisdiction. Not only does the concept of neutrality impart a state of war, not only did our original Neutrality Act take its origin from war conditions, but this Neutrality Act itself postulates a state of war. We think that Chapter 2 of the Federal Penal Code, which deals with neutrality and war, of which Section 10 is part, and which forms the setting of Section 10, cannot be examined without compelling the conclusion that neutrality and war are correlative terms, that the conception of neutrality is impossible

without the corresponding conception of war, and that, unless a state of war exist, its correlative—neutrality—has neither a cause nor reason for existence; and that before any violation of neutrality can occur, before any "offense against neutrality" can be committed, a state of war must be in existence. And we believe this conclusion to be fully in accord with the standard definitions of neutrality.

No such state of war was shown in the indictment, and the indictment is for that reason defective. The court cannot take judicial notice of foreign wars to which the United States is not a party.

Dolder v. Lord Huntingfield, 11 Ves. 283, 292; 32 Eng. Reprint, 1097;
Wigmore on Evidence, Vol. 4, Sec. 2574, note 1.

In the next place, we regard the indictment herein as fatally defective, because there is no allegation therein of any common intent known to, understood by and participated in, by each of the parties to the alleged hiring and retaining. It may, of course, be said that the independent intentions of the defendants and of the persons alleged to have been hired and retained, are set forth; but we submit that the rule in these cases is not thus satisfied; that contemporaneous independent intentions are not enough; that there must be a common intent known to, understood by, and participated in by each of the parties to the alleged hiring and retaining; for otherwise there would not be that meeting of minds essential and indispensable to a hiring and retaining,—without this, there is no offense. It is not enough, therefore, to

allege that each party to the hiring and retaining had the same intent independently.

> "It is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration before he hires him, that defines the offense."
>
> *U. S. v. Hertz,* 26 Fed. Cas. (15,357) 293, 295.

And in the *Kazinski* case, the United States attorney said:

> "He could not prove that each knew the other's intent, but he proposed to prove that each had the intent independently."

But the learned judge instructed the jury to return a verdict of not guilty; and in doing so defined hiring and retaining to be "an engaging of one party by the other, with the consent and understanding of both" (26 Fed. Cas., p. 684, column 1,; p. 685, column 1).

The indictment is further attacked by us because of its ambiguous, unintelligible, vague, indefinite, uncertain, and insufficient character; it does not afford proper notice to the defendants, or apprise them of the facts of time, place and circumstance of the purported offense sought to be charged against them; and the indictment is not sufficient to enable the defendants to prepare their defense, or to plead in bar of another prosecution any judgment upon these indictments. For example, it is impossible to tell when the alleged hiring and retaining took place. The only attempt made to apprise the defendants of so important a fact as the time of the alleged commission of the offense is the insufficient ref-

erence contained in the words "on or about"; but this form of allegation cannot be tolerated in a criminal pleading, in which time and place must be so alleged as to identify the act (*U. S. v. Millner,* 36 Fed. 890). To adopt the language of Judge Deady:

> "An averment that a fact occurred 'on or about' a single day, is not an averment that it occurred on any distinct day or time. The actual day or time may be either before or after the one stated with an 'on or about'. In short, the averment amounts to nothing, so far as time is concerned (Conroy v. O. C. Co., 23 Fed. 71, 73). And see similar conclusions reached in U. S. v. Crittenden, 25 Fed. Cas. (14,890-a) 694; and U. S. v. Winslow, 28 id. (16,742) 737, 739). These considerations acquire special force when it is remembered that the proof must be confined to the time alleged in the indictment (Fleming v. State Texas Appeals, 234)."

Again, where did the alleged hiring and retaining take place? Not only were these defendants not advised of the time, but they were given no information as to the place of the alleged offense. Assuming that the indictment shows the defendants to have been in San Francisco, still no one can tell where "within the territory of the United States", the alleged hiring and retaining was done. Nor is there a word to show where, if anywhere, any one of the persons, alleged to have been hired and retained, was at the time of such alleged hiring and retaining. For anything that appears to the contrary, these defendants might well have been in San Francisco, but the alleged hiring and retaining might well have taken place anywhere between New York and San Francisco or between Sitka and New Orleans. We submit that in every system of criminal pleading that is worthy of the name, a defendant is entitled to be ap-

prised, not only of the time, but also of the place of the alleged offense, so as to be enabled to make his defense.

And, moreover, the allegation of hiring and retaining is a pure conclusion; the constituent facts are not alleged; nothing is stated which would enable the judge to know, or the court to adjudge whether there was any hiring and retaining. And we submit that this is not a case in which the bald language of the statute is sufficient to advise the defendant of the facts; and that the personal legal conclusion of the pleader that there was a hiring and retaining, is not a legitimate substitute for the facts of the case (*U. S. v. Cruikshank,* 92 U. S. 542; *U. S. v. Carll,* 105 id. 611; *Ball v. U. S.,* 140 id. 118, 136).

Nothing, we submit, could be more vague, uncertain and ambiguous than the allegations of this indictment relative to the alleged overt acts. Thus, as against Ralph K. Blair, it was alleged, as overt acts committed by him, that he received from one A. Carnegie Ross certain sums of money, which he (Blair) deposited in bank to his account, or to that of the Blair-Murdock Company; that he (Blair) purchased certain railway tickets; and that he paid certain money to a railway company. But it is not, however, anywhere alleged in this indictment that the money alleged to have been received from Mr. Ross was applied to any unlawful purpose, nor does it anywhere appear that this money, or any portion of it, was used either to purchase the railway tickets referred to or to make the payment of June 2, 1915, to the Southern Pacific Railroad Company. Beyond the mere fact of the giving of the money by Mr. Ross to Mr. Blair, this pleading discloses no other fact. The giving of money

by one man to another man is not a wrongful or criminal act; if the giving of money by one man to another man be a step in a criminal conspiracy, then other considerations would come into view; but no such fact as this last is anywhere alleged in this indictment, otherwise than by the bald conclusion of the pleader that the giving of the money was in furtherance of the asserted conspiracy and to effect its object. So far as the alleged purchase of the railway tickets is concerned, it does not anywhere appear with what money or moneys those tickets were purchased, or even that the tickets themselves ever were used; the indictment shows nothing more than the nude fact of the purchase of the railway tickets; and there is nothing more in the pleading to show what became of those railway tickets than there is to show that the party of twenty-three referred to in the Croft telegrams, later in the indictment, did not pay their own way to New York City. And so, likewise, with the payment of the money to the Southern Pacific Company on June 2, 1915; why that money was paid, nowhere appears; its purpose is wholly undisclosed; no facts are alleged to take that Act out of the category of innocent acts and put it into that of guilty acts; and all that confronts us upon this phase of the indictment is the personal opinion of the pleader that it was an Act in aid of the conspiracy.

As against the defendant Kenneth Croft, it was charged, as alleged overt acts, that on June 19, 1915, at Chicago, Ill., he sent to Ralph K. Blair, c/o of The British Friendly Association of San Francisco, two telegrams, the one stating that "party twenty-three strong

proceeded New York three P. M. Following later''; and the other stating, ''Held up here by Federal authorities for investigation; need further funds for parties' sustenance; wire room eight fifty-nine, Federal Building''. It is not alleged anywhere in the indictment that the party of twenty-three referred to in these telegrams was the same, or any part of the same, party of twenty-five persons referred to in the earlier portion of the indictment; it nowhere appears by any apt allegation that Mr. Blair made any reply to either of them, or acted upon them, or in any other way, indicated his consciousness of the existence of either of them.

As against the defendant, Thomas Addis, it was charged, as an alleged overt acts, that on June 14, 1915, at San Francisco, he made a physical examination of four named persons. While it does appear from the indictment that three of these four persons are named among the twenty-five persons originally referred to in the indictment, yet it nowhere appears that any one of the four was part of the party of twenty-three referred to in the Croft telegrams; nor does it appear that any one of them ever left San Francisco for New York City; nor does it appear what was the purpose of the alleged physical examination, or what it had to do with the asserted conspiracy. For anything that this indictment shows, that examination may well have been for a perfectly innocent and lawful purpose, wholly disconnected from any conspiracy to commit any offense against the United States.

As against the defendant, Harry G. Lane, it was charged as an alleged overt act, that about June 14,

1915, at San Francisco, he engaged lodgings for about twenty men, among whom were three named persons. But no light is thrown upon the identity of the remaining seventeen men; not one of the three persons who were named was one of the twenty-five men originally referred to in the indictment; it nowhere appears that any one of these twenty was in the Croft party of twenty-three; it nowhere appears by what authority, or for what purpose, Lane did the act charged; and for anything that the indictment discloses, he may have engaged those lodgings for a purely personal and innocent lawful purpose, wholly separated from any conspiracy whatever.

Moreover, it is impossible to determine from this indictment that it really alleges a conspiracy, as distinguished from an offense committed by a plurality of actors. Sometimes, as in the present case, or as in bigamy, adultery, riot and other cases, the crime requires a plurality of actors; and where it is necessary that two or more persons should concur in the commission of an act in order to make it a crime,—as in the case of hiring and retaining another for foreign military or naval service; then, the agreement to commit the crime is part of the crime itself; not an independent conspiracy. See for example and analogy:

Shannon v. Commonwealth, 14 Pa. St. 226;
Niles v. State, 58 Alabama 390;
Wharton Crim. Law, 10th Ed., Sec. 1139; 2 id. 11th Ed., Sec. 1602.

In such a case, combination, which is the gist of conspiracy, is not an aggravation of the offense, but is

necessary and essential to constitute the offense; and secondly, such an agreement plus an overt act in furtherance of the crime, would constitute a mere attempt to commit the crime, but not an independent conspiracy.

2 Bishop Crim. Law, 8th Ed., Sec. 184, note 4; 5 R. C. L., pp. 1072-3.

The most recent application of this principle was to the giving and taking of a rebate. In this case, an indictment was found for conspiracy to violate the Elkins Act, prohibiting the giving and taking of rebates; and the facts were proved that the defendants had not only agreed to give and take rebates, but had actually given and taken rebates, there being three takers and two givers, besides two other persons who were go-betweens or agents. Upon the principle stated, it was held not a conspiracy.

U. S. v. Guilford et al., 146 Fed. 298.

And see the same case in another phase in 212 U. S. 481, 500.

This case was recently followed, the court saying:

> "When an offense necessarily involves an unlawful agreement between two or more persons, the parties thereto cannot be charged with conspiracy for having made such an agreement, but must be prosecuted for the principal offense. But this principle does not apply to the cause at bar, because neither smuggling nor defrauding the customs necessarily involves an agreement between two or more persons. Either offense may be committed by a single individual."

U. S. v. Shevlin, 212 Fed. 343, 344-5.

The sufficiency of the facts to support a judgment or verdict may be reviewed on error in an agreed case, and no inferences can be drawn or presumptions indulged in support of the judgment or verdict, but the case must stand or fall as made out by the agreed case. If the facts stated do not in form constitute an agreed case, they should not have been used as such, and in that event the matter should have been submitted to the jury, under proper instructions and even under the stipulation of the parties in such an event it was error to direct a verdict of guilty, or the court in such an event, regarding the agreed case as insufficient, should have directed a verdict of not guilty.

Before presenting the case as it is made by the agreed statement, we recognize that we are confronted with certain questions affecting the technique of procedure, and that we must satisfy the court that the case must stand on the agreed statement alone, unaided by inferences, and that, as so considered, on error, this court can determine whether the agreed case supports the judgment, or verdict.

Whatever may have been the early English practice on the subject, it is now settled in the United States courts that when a cause is submitted on an agreed statement of facts, the sufficiency of the facts so agreed upon to support the judgment may be reviewed on writ of error, because it is an error of law to pronounce a judgment not supported by the facts agreed upon, and such a judgment will be reversed accordingly.

U. S. v. Eliason, 16 Pet. 291;
Henderson's Distilled Spirits, 14 Wall. 44, 53.

Earlier instances where the Supreme Court recognized its right to review, on writ of error, a cause submitted on agreed statement of facts will be found in

Brent v. Chapman, 5 Cranch 358, and
Kennedy v. Brent, 6 Cranch 187.

In both these cases the jury returned a verdict for the plaintiff subject to the opinion of the court upon the case agreed. In the latter case the court below was of the opinion that the agreed case was not full enough to justify a verdict for the plaintiff, and directed a judgment for the defendant. Upon writ of error this judgment was affirmed, the Supreme Court saying that while on the points presented "The court has no doubt. But the case is imperfectly stated. It does not appear that the plaintiff has sustained any loss", etc. (p. 192).

Now, if this case had been submitted to the jury upon the facts set forth in the agreed statement of facts as merely evidence in the cause, and not as upon an agreed case, and the jury had drawn inference from the facts so set forth in the agreed statement, it may be that under authority of

Turner v. N. Y., 168 U. S. 90; 18 U. S. Sup. Ct. Rep. 38;
Crumpton v. U. S., 138 U. S. 361; 11 Sup. Ct. Rep. 355,

this court could say that upon a writ of error it could not review these inferences of fact drawn from the evidence. We recognize that, in ordinary cases, an appellate court cannot on writ of error examine the evidence to ascertain whether the jury was justified in finding

as it did upon the issues of fact, where such an investigation involves the balancing of testimony.

Express Co. v. Ware, 20 Wall. 543, 545.

Yet, on writ of error, the court can look to the evidence to see whether there was no evidence at all to sustain the verdict.

Lancaster v. Collins, 115 U. S. 222; 6 U. S. Sup. Ct. Rep. 33.

But the agreed statement of facts in the case at bar must be treated as a special verdict.

Campbell v. Boyreau, 21 How. 223, 226.

Now, if the jury in this case had rendered a special verdict, in which they found the facts to be exactly as set forth in the agreed statement of facts (and this is no more than treating the agreed case as a special verdict), the court could, on writ of error, ascertain whether the judgment rendered thereon was correct in point of law. Thus, where in a criminal prosecution a special verdict was returned by the jury, and intent was an essential element of the crime, and was not found, no judgment could be entered on the verdict.

U. S. v. Buzzo, 18 Wall. 125.

The judgment of a subordinate court on a special verdict may be re-examined in an appellate tribunal.

Mumford v. Wardwell, 6 Wall. 423, 433.

> "Where a special verdict is rendered, all the facts essential to entitle a party to a judgment must be found and a judgment rendered on a special verdict failing to find all the essential facts, is erroneous."

Ward v. Cochran, 150 U. S. 547; 14 U. S. Sup. Ct. Rep. 230, 233.

In the case of

Barnes v. Williams, 11 Wheat 415,

Chief Justice Marshall said:

> "Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff" (p. 416).

> "Where there is a case stated, or special verdict, the court must not reverse the judgment below, if erroneous, but enter a correct and final judgment. If a special verdict be ambiguous, or imperfect,—if it find but the evidence of facts, and not the facts themselves, or *finds but part of the facts in issue, and is silent as to others*— it is a mistrial and the court of error must order a venire *de novo.* They can render *no judgment on an imperfect verdict,* or *case stated.*" (Italics ours.)

Graham v. Bayne, 18 How. 60, 63.

The sufficiency of facts to support a judgment may be reviewed on error when the facts are set forth in an agreed case.

Hipple v. Bates Co., 223 Fed. 22 (8th C. C. A.).

It is evident from the foregoing authorities that the facts of the case on error must be deemed those facts only which are stated in the agreed statement of facts, and none other.

> "Agreed statements rest upon the consent of the parties, and, consequently, the action of the revising tribunal must be confined to the agreed facts."

Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592, 603.

That would have been the case if the jury had returned a special verdict in the language of the agreed statement. That would have been the case if the court had tried the case without a jury and made a general finding of guilty upon the agreed statement.

Supervisors v. Kennicott, 103 U. S. 554, 556;
Chicago etc. Ry. Co. v. Barrett, 190 Fed. 123.

That must be the case here, even though the jury made a general finding of guilty, because that finding was directed by the court, and the opinion or verdict of the jury, to the extent that it may go beyond the facts stated in the agreed case, does not represent the conclusions which the jury might have drawn from the facts in the agreed statement, but represents the conclusions which they were directed to draw. We think, therefore, on this writ of error, the question is fairly presented to this court, whether the facts stated in the agreed statement, standing by themselves, unaided by what the court in *U. S. v. Ross,* 92 U. S. 281, 283, characterized as "piling inference upon inference", are sufficient to establish a conspiracy on the part of the plaintiffs in error, as charged in the first count of the indictment.

The agreed statement of facts in this case was not prepared for the purpose of determining as an issue of law whether a combination of two or more persons, by concerted action to hire or retain persons to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of the King of Great Britain and Ireland as soldiers, constituted an offense against the United States, for

that issue of law is clearly determined by the statute. The agreed case was prepared for the purpose of securing a judicial determination whether the acts done by the plaintiffs in error, set forth as facts in the agreed statement, constituted a conspiracy to hire or retain persons to go beyond the limits or jurisdiction of the United States with the intent referred to.

Now, it is evident from what we have already developed, that, before the plaintiffs in error could be guilty of hiring or retaining persons to go out of the United States with the intent referred to, a contract of hire must have been entered into between the plaintiffs in error and the transported men; and that before a conspiracy can be established, it must be established that the plaintiffs in error combined to make such contracts of hire. It is clear from the agreed statement of facts that they do not establish that the plaintiffs in error made any express contracts of hire such as the statute prohibits. It remains, then, to determine merely whether the facts set forth in the agreed statement show the creation by the plaintiffs in error of a set of circumstances from which a tacit contract of hire arose. Unless the facts set forth in the agreed statement show that the plaintiffs in error created such a set of circumstances, then the agreed statement fails to show the making of any contracts of hire on the part of the plaintiffs in error, and failing that, also fails to show any conspiracy upon their part to do so. If there are any other facts which, taken together with the facts disclosed in the agreed statement, might be sufficient to establish the creation by plaintiffs in error of circum-

stances from which a tacit contract of hire could arise, those further facts should have been set forth in the agreed statement. They can no more be incorporated therein by inference than could the intent be inferred in the special verdict in *U. S. v. Buzzo,* supra. The stipulation with which the agreed statement of facts is introduced reads that "the parties hereby agree that the *facts hereinafter set forth* are, and may be, treated as the *facts* in the cause" (Transcript p. 99; italics ours). It is not declared in this stipulation that the facts set forth in the agreed statement, *and such inferences as may be drawn therefrom consistent with guilt, disregarding all inferences which may be based thereon, consistent with innocence,* may be regarded as the facts in the cause; and, it was because the stipulation was worded as it was, that the plaintiffs in error were content to stipulate further than "upon a consideration of *said* facts the court may instruct the verdict which the jury shall render in said cause" (Transcript p. 99; italics ours). Had the plaintiffs in error suspected that the court was going to usurp a function of the jury, that is peculiarly appropriate to a jury, and intended to base the directed verdict, not upon the facts set forth in the agreed statement, but upon those facts *and such inferences as the court might see fit to draw therefrom,* it is doubtful whether the plaintiffs in error would have entered the stipulation in the cause.

The claim of the plaintiffs in error in this case is, that they did not put any of the transported men under any express or tacit obligation to go beyond the limits of the United States with the intent proscribed by the

statute, and that, therefore, they were not guilty of making contracts of hire, and, that all that they combined to do, was to do those acts which they admit that they performed, namely, to facilitate the transportation to New York of British subjects sound in body and limb, and furnish sustenance and transportation in connection therewith, avoiding, in each case, the imposition of any express or tacit obligation upon the men concerned to go beyond the limits of the United States with the proscribed intent. The question which they and the British Government desired to have determined was, whether these acts constituted a violation of the American Neutrality Statute. The remarks of the United States attorney preceding the submission of this agreed statement to the court are consistent with this view of the case. He said:

> "This is a case of considerable importance, and in order that the matter may be properly and expeditiously tried and determined, that is, *on the questions of law* involved, counsel have stipulated as to what the facts are in this case, with the further proviso that this court may pass *upon the sufficiency of the facts or the insufficiency thereof* and may either direct or intimate to the jury its opinion in the matter, the consent of the defendants being that the jury shall follow the court's intimation or opinion after a consideration of these *stipulated facts*. That procedure simply means, if carried out, that this jury is here by agreement to follow the opinion of the court as to *the sufficiency or insufficiency of the facts in this case*" (Trans. p. 97; italics ours),

to which the court replied:

> "Perhaps that is no more than asking the court to pass on the *sufficiency of the facts* to warrant a conviction, is it?" (Trans. p. 98; italics ours.)

Mr. Preston replied:

> "That is exactly what it means," and then read the stipulation (Trans. p. 98).

The agreed statement of facts was then read to the jury, after they had been duly impaneled and sworn (Transcript p. 98). No intimation was made by the court that the agreed statement of facts was not sufficient in itself. And yet before it could be accepted as an agreed statement of facts and treated as such, it was necessary that it measure up to the legal standard of an agreed statement. That standard has been declared by the United States Supreme Court in

Burr v. Des Moines Co., 1 Wall. 99, 102,

as follows:

> "The statement must be sufficient in itself, *without inferences or comparisons,* or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fulness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon." (Italics ours.)

It was not contemplated that the agreed statement of facts was to be treated as the basis for inferences. It was not contemplated that the court was to perform any function of the jury. It was only contemplated that, on the basis of the facts stated in the agreed case, the cause should be determined on the questions of law involved. If, in the opinion of the court, the facts set

forth in the agreed statement, standing alone, were not sufficient to justify a verdict of guilty, then it was the duty of the court either to decline to allow the case to be submitted, upon an incomplete or insufficient agreed statement, or to refuse to direct a verdict, and then to leave the case to the jury, on the agreed case, as evidence only. · The fact that the court gave no such intimation, the fact that the court accepted and treated the agreed statement as complete and sufficient in itself, is enough to entitle this court, on error, to determine whether the verdict of guilty directed by the court is supported by the agreed statement of facts, unaided by inferences or presumptions of fact, imported into the case and not set forth in the agreed statement.

The agreed statement has all the earmarks of an agreed case. It was signed by counsel (Transcript p. 112), it was read to the jury (Transcript p. 99), it and the exhibits attached thereto were filed with the clerk of the court (Transcript pp. 74, 128). Upon this agreed statement the Government rested its case (Transcript p. 128). It has been duly incorporated in the bill of exceptions on behalf of the plaintiffs in error (Transcript pp. 95, 99-128). Speaking of such an agreed statement of facts, the Supreme Court declared that when the same was signed by counsel, filed with the clerk of the court, and it appeared in the bill of exceptions that the case was submitted on such an agreed statement of facts, the Supreme Court, on writ of error, could determine whether the facts were sufficient to support the judgment, although the findings of the court

on them were general in form, and in that case the judgment was reversed.

Supervisors v. Kennicott, 103 U. S. 554.

The facts set forth in the agreed statement do not constitute conflicting evidence or require the balancing of admitted facts. As the conspiracy charged, in substance, amounts to a conspiracy to do a lawful act (namely, to aid and assist men to leave the country for a purpose which as to them is perfectly lawful), by the use of an unlawful means, to wit, by entering into contracts, hiring them to go beyond the limits of the United States with the intent proscribed by the statute, it follows that the facts constituting the unlawful means, if there were such, must be set forth with particularity, and that, therefore, the facts set forth in the agreed statement are not mere evidence, or simply probative facts, but are the ultimate facts, upon which the conclusion of law, as to the conspiracy charged, must rest. Had the court believed that the facts set forth in the agreed statement were not, standing by themselves, and unaided by inferences, sufficient to establish the charge of conspiracy made in the indictment, the court should either have refused to accept the agreed case as satisfactory or have insisted upon leaving the case to the jury, as an essential function of the jury, namely, the right to indulge in inferences, was involved; and as, if such were the view of the case, it was not within the letter of the stipulation of the parties that the drawing of these inferences should be left to the court. The fact that the court did not take such a course satisfies us that in the opinion of the

court the facts of the case as set forth in the agreed statement were sufficient to justify a verdict of guilty, without the aid of any inferences to be drawn therefrom; and that, therefore, anything which the court may have said in the course of its opinion or instructions to the jury which may have gone beyond the facts set forth in the agreed statement could, in the opinion of the court, do the plaintiffs in error no substantial injury.

Now, as a matter of law, in a case of this sort, under the Sixth Amendment to the United States Constitution, the plaintiffs in error were entitled to a trial by jury, and this means a trial by jury according to the course at common law, and, therefore, the court could not as a matter of law, direct the jury to render a verdict of guilty, no matter how sufficiently the court may have thought the facts set forth in the agreed statement established their guilt.

U. S. v. Taylor, 11 Fed. 470.

> "We have said that with few exceptions the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged."
>
> *Sparf v. U. S.,* 156 U. S. 51; 15 U. S. Sup. Ct. Rep. 273, 294.

And the Supreme Court, in making the statement just quoted, cites and quotes with approval from *U. S. v. Taylor,* supra.

The plaintiffs in error, however, stipulated that the court might instruct the verdict which the jury should render in said cause; but notwithstanding this stipulation, as a matter of law, the court was without authority to direct a verdict of guilty in a case such as this, because the rights of the plaintiffs in error in the case were rights which they could not waive and, therefore, the power to direct a verdict of guilty was one which they could not confer upon the trial court.

Thompson v. Utah, 170 U. S. 343; 18 U. S. Sup. Ct. Rep. 620, 624;

Freeman v. U. S., 227 Fed. 732.

The plaintiffs in error, however, are not inclined to avoid the effect of their stipulation. On the contrary it is their preference to abide thereby, provided the true intent thereof can be preserved, and provided, therefore, this court shall be free to determine, as an issue of law, on the writ of error issued in this case, whether the facts set forth in the agreed statement, unaided by inferences, are sufficient to justify a verdict of guilty. If those facts as so set forth, standing alone, are not sufficient to justify a verdict of guilty, but if it will in this court be assumed, in support of the verdict of the jury, that inferences from those facts could be drawn consistent with guilt, and, therefore, it will be presumed that such inferences were so drawn and will not now be reviewed, the plaintiffs in error would be in a sad predicament, and must then, but in that event only, insist upon their full legal rights. For, under such

circumstances, they would have been denied all right or opportunity of suggesting to the jury other inferences, which could be drawn from the facts set forth in the agreed statement, consistent with innocence, and calculated, therefore, under proper instructions to the jury, as to the doctrine of reasonable doubt, and as to the presumption of innocence, to raise in the minds of the jury sufficient doubt, in connection with the presumption of innocence, to incline them to the view that the offense charged had not been established to their satisfaction beyond all reasonable doubt.

But we do not think that it is necessary that this court must conclude that it cannot determine the case upon a consideration of the question whether the facts set forth in the agreed statement, taken by themselves, are sufficient to justify the verdict of guilty. The plaintiffs in error requested the trial judge, upon the facts set forth in the agreed statement, to direct a verdict of not guilty, and this request was denied (Transcript pp. 129, 160). If the agreed statement of facts was in itself incomplete or insufficient to support a judgment then, under the principles of *U. S. v. Buzzo,* it was error to refuse to direct a verdict of acquittal. To same effect see also

Vernon v. U. S., 146 Fed. 121, 126.

These observations, we believe, will dispose of any preliminary matters which we are obliged to encounter before directing attention to a consideration of the errors upon which we rely.

THE AGREED STATEMENT OF FACTS.

The agreed statement of facts is not to be enlarged by any argumentative process, however ingenuous or subtle; no new matter can be fairly injected into this statement; were that permitted, we should no longer have a given state of facts voluntarily brought to the court by the parties, but an entirely different case, and one not approved by mutual consent; and "agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts" (Pomeroy, Lessee v. Bank of Indiana, 68 U. S. (1 Wall. 592)).

This cause, being a test case, did not pursue the customary routine of an ordinary criminal cause, but was disposed of in the court below upon a written agreed statement of the facts. No other or different showing was made below; no witness was sworn or testimony given; no document was presented except those attached to the agreed statement itself; and this court has now before it precisely the same materials out of which to frame its judgment as the lower court employed in framing the judgment now being attacked. It may be said that presumptively the judgment of the lower court is correct; but whatever may or may not be the force of this presumption in cases which proceeded below along the usual and customary lines of an ordinary criminal trial, we submit that such a presumption can have little or no weight in a test case which departed from customary lines and proceeded upon the unusual and exceptional lines of that at bar.

In the next place, how is this agreed statement of facts to be interpreted? What is to be the mental attitude of the court towards it? Is it to be approached

in a spirit of hostility to the plaintiffs in error, or in a spirit sympathetic to the plaintiffs in error, or in a spirit of fairness, lit up by the presumption of innocence and the doctrine of reasonable doubt. The presumption of innocence and the doctrine of reasonable doubt, being the fundamental basis of all criminal jurisprudence worthy the name, are as actively operative in an appellate as in a *nisi prius* court; they should, we submit, be particularly active in a cause exhibiting the unusual characteristics of that at bar. Are they to be laid out of view in approaching the consideration of this agreed statement of facts? Mr. Justice Stephen has somewhere acutely laid stress upon the importance of mental attitude in cases of this character. He points out that if the investigator prejudges the cause by assuming a mental attitude antagonistic towards the person accused, then every circumstance, however harmless intrinsically, becomes abnormally exaggerated and presents itself to the mind either as an index to guilt, or if one may depart for the moment, as one of Attorney-General Cushing's "subterfuges"; but if, upon the contrary, the investigator holds mentally steadfast to the two cardinal doctrines of presumptive innocence and reasonable doubt, those circumstances which otherwise would have been so suggestive of guilt, become indifferent or colorless, resume their normal proportions, and cease to possess an exaggerated significance as indicative of guilt. Between these two phases of thought, there can, of course, be no choice for the impartial investigator. Under the beneficent rules of Federal criminal jurisprudence, where, as here, the plaintiffs in error repudiate guilt, they are

presumed to be innocent of the offense charged in all its parts. They are entitled to the full and unrestricted operation in their favor of the doctrine of reasonable doubt. They are not to be prejudiced by intendments, inferences or presumptions; and in a case of exceptional characteristics, like that at bar, which is to be determined upon the set lines of a written statement, which exhibits open conduct, no "subterfuges", no mysterious secrecies, no enlistment of any man, no agreement of hiring and retaining of any man, no solicitation of any man to be hired or retained, no one of the usual earmarks that a partisan prosecutor would avidly look for, we respectfully submit that this agreed statement of facts is to be approached and interpreted with minds entirely free from any hostility toward the plaintiffs in error, however arising.

In the next place, there are certain general characteristics of this agreed statement of facts, which, we submit, should be, throughout the investigation of this cause, held steadily in the mind:

First. This agreed statement of facts was and is filed and used as the sole showing of fact in a criminal, not in a civil cause; and it is, therefore, subject to the doctrines of presumptive innocence and reasonable doubt.

Second. This agreed statement of facts was not filed and used in a controversy submitted without action, but in an ordinary criminal action in which it was the sole showing of fact.

Third. This agreed statement of facts contains no such clause as appears in some of the decided cases,

allowing or authorizing either the *nisi prius* or appellate court to add, by any process of intendment, inference, presumption, construction, or interpretation, any fact or facts to those specifically agreed upon in the instrument itself.

Fourth. This agreed statement of facts expressly and in pointed terms declares "*that the facts hereinafter set forth are, and may be treated as, the facts in the cause,* and that upon *a consideration of said facts* the court may instruct the verdict which the jury shall render in said cause."

Fifth. This agreed statement of facts, after the introduction referred to above in paragraph fourth, commences its statement with the significant heading "Facts".

Sixth. This agreed statement of facts, in paragraph 10 thereof, after referring to these plaintiffs in error, sets forth that they "*Did the acts and things now herein set forth* as done by them".

Seventh. This agreed statement of facts contains no statement whatever that any other fact or facts, save and except those agreed to be the facts, ever existed.

Inasmuch as this is a criminal cause in which the burden of proofs rests upon the Government and requires it to establish the guilt of defendants by facts so clear, unambiguous and convincing that the strong presumption of innocence is overcome and the doctrine of reasonable doubt displaced, it must be obvious, we think, that these characteristics of the agreed statement of facts are of primary importance. Since the

burden is upon the Government to establish guilt beyond all reasonable doubt, and not upon the defendants to show their innocence, it follows that the onus is upon the Government to make clear, to the exclusion of all reasonable doubt, its right, from the very facts that have been agreed upon, to recover judgment herein; and if there be any ambiguity in the stipulated facts, if there be any omission of a fact or facts necessary to recover in this criminal cause, if there be any lack of clearness or certainty upon material points, it cannot in justice be said that the Government has sustained the burden cast upon it by law.

This agreed statement of facts recites that the facts set forth are "the facts in the cause", and that the plaintiffs in error did the acts and things "now herein set forth". In other words, all of the facts in the cause", and all of the acts and things done by the plaintiffs in error and "now herein set forth", must be taken to be contained in the agreed statement of facts; and the cause, we submit, must be dealt with solely upon that footing (*Donohoe v. Turner,* 90 N. E. (Mass.) 549; *T. M. Railway v. Scott,* 129 S. W. (Texas) 1170; *Freidman v. Jaffe,* 92 N. E. (Mass.) 704). The facts recited in this agreed statement of facts are the very facts that have been *agreed to,* and upon which the minds of the parties met. No other fact or facts became the subject of any agreement between the parties; and it cannot, in good faith and justice, be urged that these defendants consented to any fact or facts other than those actually recited in the written instrument which, through their counsel, they signed. This agreed statement of facts shows upon its face that it was deliber-

ately and carefully drawn. It was no hurried or spasmodic act. The language was carefully chosen to mean just precisely what it expressed—no more, no less; and any attempt, by any process, to import into this written instrument any fact or facts not agreed or consented to by the parties in plain terms in the statement itself would, we submit, be a crying injustice. This agreed statement of facts grows out of and rests upon the contract and agreement of the parties. It could not, and did not, have any other origin, but should either party, by any process whatever, however ingenious or subtle, be permitted to inject new matter into this statement, we should obviously no longer have a given state of facts voluntarily brought to the court by the parties, but an entirely different case, and one not approved by mutual consent. While a fact agreed upon might be conceded, still any new additional matter sought subsequently to be injected into the cause by some process of argument, inference or construction, might very well be resisted; and moreover, the agreed fact itself might very well not be conceded at all if it were known that subsequently it would be used as a portal through which argumentative or inferential new matter would, against consent and without agreement, be marched into the cause. It is pointed out by the Supreme Court that

> "agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts".
>
> *Pomeroy's Lessee v. Bank of Indiana*, 68 U. S. (1 Wall.) 592;

and since the judgment, whether at *nisi prius* or in the

appellate court, must be based upon those facts which have been agreed to as being "the facts in the cause", it must follow that whatever is not distinctly and expressly agreed upon and set forth as admitted, must be taken not to exist; *quod non apparet, non est* (*The Clara,* 102 U. S. 200).

The view for which we are contending is supported by well considered decisions. Thus, *Old Colony Ry. v. Wilder,* 137 Mass. 536, was submitted upon an agreed statement of facts; and in the opinion of the Supreme Judicial Court, considerable attention was given to the rules upon this subject; the court said:

> "When an action is submitted to the Superior Court upon a case stated, containing no clause authorizing the court to draw inferences of fact, the only question presented by it is the question of law whether, upon the facts stated, the plaintiff has made a case which entitles him to judgment. Unless, upon such facts, with the inevitable inferences, or, in other words, such inferences as the law draws from them, a case is made out, the court would consider that the plaintiff has not sustained the burden of proof, and therefore is not entitled to judgment. But neither the Superior Court in the first instance, nor this court upon appeal, has the right to found its judgment upon any disputable inferences of fact. This view of the nature of a case stated is sustained by other courts.
>
> We think the decisions of this court are all consistent with this view, though, as we have before stated, some of the expressions in the opinions would seem to imply that the court had the right to found its judgment upon inferences of fact which it might draw from the facts stated. But it is often found that a case stated is imperfect, in failing to state some fact which is essential to the determination of the rights of the parties. In such cases, if it appears that the facts stated are all that the plaintiff is able to prove, and they are insuf-

> ficient to establish his case, the court will enter judgment against him, upon the doctrine of the burden of proof. But if it seems that the needed fact is inadvertently omitted, or is a fact which is susceptible of proof, one way or the other, the usual course is for this court to discharge the case stated, and remand the unsettled question of fact to be tried in the Superior Court, by the proper tribunal."

And so, likewise, in a later case, the same learned court speaking of the action before it, remarked that

> "It is submitted to the court upon an agreed statement of facts, and it is a familiar rule of law, that, upon a case thus presented, no inferences can be drawn from the facts stated, but the question is whether these facts entitle the plaintiff as matter of law to a judgment in his favor," citing authorities.

Friedman v. Jaffe, 92 N. E. (Mass.) 704;

and see also to the same effect, *Vera v. Mercantile F. & N. Ins. Co.,* 103 id., 292. And so, also, in Texas, it is held that where a case is submitted by the parties under an agreed statement of facts, and that the agreed statement is signed and certified by the court to be correct with the judgment shall constitute the record in the cause, in the absence of some agreement to the contrary, the court is confined to the facts contained in the statement, and can only declare the law arising from such facts; and "that a finding of other different facts is beyond its province" *(Texas Mexican Ry. v. Scott,* 129 S. W. (Tex.) 1170, 1178). And so likewise, in California, Field, C. J., delivering the opinion, it was said:

> "The action of the District Court upon the agreed case was irregular and unauthorized. The consideration of the court was restricted to the facts admitted, and its

judgment could not be based upon any other facts which it may have supposed the plaintiff could establish."

Crandall v. Amador County, 20 Cal. 72, 74;

and see this case approved and followed in *Green v. County of Fresno,* 95 Cal. 329. And see also as bearing upon this matter, *Byam v. Bullard,* 4 Fed. Cas. No. 2262; *Burnham v. North Chicago St. Ry.,* 78 Fed. 101.

We agreed to the facts stated in the agreed statement of facts, but we agreed to nothing more; had it been the design of the parties to insert into that agreed statement any other fact than the very facts therein actually recited, apt words would have been employed to effect that end; but the parties not only did not do so, but agreed that the facts therein set forth "were the facts in the cause"; and this court, we submit, will not now import into this agreed statement of facts, by a process of argumentation, other facts or matters which might readily have been inserted therein by the parties if such had been their intention (*Cahoon v. Levy,* 10 Cal. 216—cited as authority in *Hammontree v. Huber,* 39 Mo. App. 326, 328; *San Jose v. Uridias,* 37 Cal. 339). That the parties did not agree to any other facts than those set forth in the agreed statement is pregnant with significance; had these parties contemplated the introduction of such other facts into this agreed statement, it would have been very simple and very easy for them to have said so; and we may very well appeal to the parallel rule applied in the construction of written statutes, whereby a proposed construction which would contract or expand the meaning of the language used has been rejected upon the well settled principle that the legislators would have ex-

pressed in plain terms what it would have been easy to say, had there been such an intention. It was observed by Marshall, C. J. (*Strode v. Stafford, Justices,* 1 Brook (U. S.) 162) that

> "it is probable, had a more extended operation been intended, some terms would have been used indicative of that intention";

and when considering the conditions under which vessels may enjoy or forfeit the privileges of registration under our navigation laws, the Attorney-General exhibited his reliance upon the principle of statutory construction which we are invoking, by using the following language:

> "Considering the care with which these laws have been framed, it would seem but reasonable to conclude that if Congress had intended that a vessel with an American register, and continuously owned by a citizen of the United States should, forfeit her privileges as such by sailing under the protection of a foreign flag since the close of the rebellion, *such intention would have been clearly expressed.* The silence of Congress on this head, and the precision and particularity with which it has set forth the cases in which the benefits of registration may be lost, alike forbid any resort to implication for the purpose of raising other grounds of forfeiture, especially when the effect of doing so must be to abridge the rights of our own citizens and diminish our tonnage. To hold otherwise would be to violate one of the best-settled canons of interpretation, that the enumeration of excepted cases strengthens the application of a statute to cases not excepted."
>
> *Registry of Vessels,* 17 Ops. Atty.-Genl., 443, 444.

The position here taken—the position that if the parties had intended that any other or additional facts than those agreed to might be, by any process, imported into this agreed statement, it would have been easy to say so, and no reason suggests itself why they should

not have unequivocally said so (*Austin v. U. S.,* 155 U. S., 432), and if such was the intention of these parties, it is fair to presume the words would have been inserted in the appropriate place to accomplish such a result (*Grace v. Collector of Customs,* 79 Fed. Rep. 319), this position is supported by innumerable cases of which the following are some:

U. S. v. Chase, 135 U. S., 259;
Tompkins v. Little Rock etc. R. R., 125 id. 217;
Vicksburg etc. R. R. v. Dennis, 116 id. 669;
U. S. v. Ryder, 110 id. 739;
Shaw v. R. R., 101 id. 565;
Tillson v. U. S., 100 id. 46;
Bank v. Matthews, 98 id. 627;
Balt, etc., R. R. v. Grant, id. 403;
Farrington v. Tennessee, 95 id. 689;
Ryan v. Carter, 93 id. 83;
Leavenworth etc. R. R. v. U. S., 92 id. 744;
James v. Milwaukee, 83 id. (16 Wall.) 161;
The Cherokee Tobacco, 78 id. (11 Wall.) 630;
U. S. v. Anderson, 76 id. (9 Wall.) 66;
Butz v. Muscatine, 75 id. (8 Wall.) 580;
Moore v. Am. Trans. Co., 65 id. (24 How.) 38;
Lawrence v. Allen, 48 id. (7 How.) 796.

The law does not presume that crime has been committed; the law does not presume that an accused person is guilty; the law puts the burden of proof upon the accuser; and the law requires the accuser to establish the truth of the accusation beyond all reasonable doubt; evidence, therefore, which leaves it uncertain whether the crime charged was committed, or whether

the accused committed it, is insufficient for any judicial purpose; and hence, where the facts of a case are consistent with varying theories, a judicial tribunal will adopt that construction which makes for innocence.

Tucker v. U. S., 224 Fed. 833;
U. S. v. Richards, 149 id. 443;
Vernon v. U. S., 146 id. 121;
U. S. v. Hart, 78 id. 868; affirmed, 84 id. 799;
Ward v. State, 28 S. E. (Geo.) 982;
Perkins v. State, 23 So. (Miss.) 579;
Mitchell v. State, 29 S. E. (Geo.) 435;
Boyd v. State, 43 So. (Ala.) 204;
People v. Bonnie, 98 Cal. 280;
People v. DeFore, 64 Mich. 693;
People v. McCard, 40 N. W. (Mich.) 784.

In a word, there cannot be two presumptions in a criminal case, and "people are not to be convicted on felony upon legal presumptions" (*People v. Strassman,* 112 Cal. 683; *Breaky v. Breaky,* 2 Up. Can. Q. B. 353; *People v. Feilen,* 58 Cal. 218; *State v. Hodkins,* 19 Maine, 155; *Green v. State,* 21 Fla. 403; *Weinburg v. State,* 25 Wis. 370).

Naturally, therefore, we respectfully protest against the injection of any additional matter into this cause by any argumentative process; and we say, with the Supreme Court *(The Clara,* 102 U. S. 200), *quod non apparet, non est.* If, in the face of this agreed statement of facts, we are to slip the leash from imagination, and indulge in those "surmises, speculations and conjectures", which are condemned in the *Porter* case,

supra, what is it that we are to report into the case? The Supreme Court declares that

> "We take a case on appeal as it comes to us in the record and receive no new evidence".
>
> *Pacific Railroad v. Ketchum,* 101 U. S. 289;

but if that rule is not to be observed here, if the products of imagination, speculation and conjecture are to be substituted for, or superimposed upon, this formal, deliberate, carefully drawn written record, where are we to stop? The Supreme Court instructs us that

> "Agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts".
>
> *Pomeroy's Leasee v. Bank of Indiana,* 68 U. S. 1 Wall.) 592;

but if the agreed statement in the present cause is to be ignored in whole or in part, or if new facts never agreed to are to be imported into the cause, by an argumentative process, what limit can be put upon a procedure so subversive of the deliberate agreement of the parties? And if we are to have argumentative additions to this agreed statement, why should they not, according to all rules and analogies current in criminal causes, operate in favor of innocence, rather than in favor of guilt, particularly in a test case which has pursued the unusual course that this has pursued, and in a case wherein this court is fully as competent as the lower court, to interpret the solitary written record on which the cause was presented?

Nor will an appellate court look to anything outside the record actually before it; except as to matters judicially noticed, and fundamental or judicial errors,

appellate review is confined to matters apparent from the record, and matters *aliunde* will not be considered (*In re Oakland Lumber Co.,* 174 Fed. 654; *Keeley v. Ophir Hill Con. Mining Company,* 169 id. 201).

And that outside matters, not sustained by the record cannot be referred to except by violating the terms of a stipulation between the parties, which stipulation, by agreement, contained all that was submitted to the court, see *Schley v. Pullman P. C.,* 120 U. S. 575, where counsel was deservedly censured by the court for introducing into his printed argument facts not found in the record, and in violation of the stipulation between the parties. In this case, the offending counsel referred to these unstipulated facts as *"incontrovertible facts"* (*Quousque tandem abutere patientia nostra?*), and attempted to excuse his breach of professional propriety by *"the extreme brevity of the record"*.

CONSPIRACY.

The agreed statement of facts fails to establish beyond all reasonable doubt any corrupt and felonious conspiracy between Messrs. Blair and Addis to violate Section 10 of the Federal Penal Code. There can be no conspiracy to violate Section 10, unless the act which the conspiracy was designed to accomplish was a hiring or retaining, within the territory of the United States, of persons to go beyond the limits and jurisdiction of the United States with the common intent known to, understood by, and participated in by all persons concerned, that such persons so hired and retained should enlist and enter in the service of the King of Great Britain and Ireland as soldiers:

"It is neither criminal nor unlawful to do, or to conspire to do, that which the law does not prohibit, but recognizes may be lawfully done without prejudice or injury to the United States or the State" (Fain v. U. S., 209 Fed. 525, 531). A combination to do what one is not prohibited by law from doing is not a criminal conspiracy; and it is not a violation of Section 10 to assist home physically fit British subjects, who are not shown, beyond all reasonable doubt, to have been hired or retained to enlist in the military or naval service of Great Britain, and who are left free to enlist therein or not as they please.

In the shape in which the cause comes here, all other defendants having been eliminated, the question is presented as to whether, between Messrs. Blair and Addis, there was any corrupt and felonious conspiracy to violate Section 10 of the Penal Code. No other "conspiracy" except that, is charged against them. No claim or pretense is made that they, with studied elaboration, entered into any formal conspiracy; no conscious criminal purpose inspired their conduct, because, as suggested even by the learned judge of the court below, "they believed they were acting within the law"; and the sole source of information as to their purpose of conduct is the agreed statement of facts, which statement, in our opinion, is utterly barren of any fact or facts exhibiting any criminal concert between them to hire or retain men here for service as soldiers in the armies of Great Britain.

A careful examination of this agreed statement of facts will disclose that it deals with three distinct periods of time, namely:

First. That period which extends from August 1, 1914, the date of the outbreak of the war, to March 15, 1915, the date alleged in the indictment as the date of the formation of the alleged conspiracy.

Paragraphs 1-9.

Second. That period which extends from March 15, 1915, the alleged date of the formation of the alleged conspiracy, to June 16, 1915, when the 25 persons named in the indictment left San Francisco for New York City.

Paragraphs 10-39.

Third. That period which extends from June 16, 1915, the date of the departure of the 25 men from San Francisco for New York City, to July 8, 1915, the date when the indictment was filed in this cause.

Paragraphs 40 to 56.

It was during the first of these periods that the consular notice to the naval reserves, and the newspaper comment thereon, were published; this notice and this comment were published upon the same day, August 3, 1914. There is no pretense anywhere in this cause, whether in the indictment or in the agreed statement of facts, that any "conspiracy" existed then, or that either of these plaintiffs in error caused either of those publications; and the agreed statement of facts shows that these publications were made some eight months before any "conspiracy" is claimed to have been entered into. The agreed statement of facts wholly fails to establish any privity, connection or relationship, of any character whatever, between Mr. Ross, or either of these

publications, and the plaintiffs in error or either of them; it nowhere states as any agreed fact in this case that either of these plaintiffs in error ever inspired or instigated either of those publications, or ever saw or read them, or ever knew of their existence; it nowhere states as any agreed fact in this cause that, during this period, either of these plaintiffs in error was acquainted with either Mr. Ross or the publisher of the newspaper that printed the comment upon the consular notice; nowhere in this agreed statement of facts is a single agreed fact stated to show any acquaintance whatever between either Mr. Ross and either of these plaintiffs in error, or between these plaintiffs in error, prior to March 15, 1915; and we submit that, upon no principle of justice, can these publications be employed as against these plaintiffs in error, neither of whom was in any way responsible therefor or connected therewith. Neither on August 3, 1914, nor on any other date during this first period was there any conspiracy in existence for any purpose, or any engagement of any man here to go abroad for enlistment in any foreign military service; Ross, Blair and Addis are not shown to have been anything but strangers to each other; no combination of any sort existed among these strangers; no services of any sort had been procured by Ross prior to March 15, 1915 (paragraph 10); and this consular notice and the newspaper comment thereon are pure *res inter alios acta* and inadmissible hearsay. If the agreed statement of facts had exhibited some link of connection between these publications and plaintiffs in error, one could understand the presence of paragraphs 6 and 7; if it appeared that these plaintiffs in error were among the "large

number of people", not who may have visited the Consulate for any purpose different or indifferent, but who actually "responded to said notices" (paragraph 8), one might, perhaps, to a limited extent but with serious qualifications, understand why this impotent inutility should congest this agreed statement of facts; but nothing of the kind appears, and these hearsay publications might equally as well have been made at the antipodes for any knowledge that plaintiffs in error ever had of them.

It was during the second of these periods, from March 15 to June 16, 1915—a period of three months—that Mr. Ross "procured the services' of plaintiffs in error, and they "did the acts and things" now herein set forth as "done by them". And when we turn to those "acts and things", to ascertain what actually was "done by them", we see plaintiffs in error doing precisely the "acts and things" which they would naturally have done if their purpose was to assist uncrippled British subjects, home and abstaining from doing the very "acts and things" which they would naturally have done if their purpose had been to recruit soldiers for the British army. We see the office, the British Friendly Association and its object, the physical examinations, the sustenance money, the railroad tickets, the departure of the men; but we do not see any departure or claim of departure from the consular instructions, or any inducing of men to engage to enlist abroad, or any solicitation of men to be hired or retained here to go abroad to enlist as British soldiers, or any agreement between Blair and Addis to recruit soldiers for

the British army, or any agreement for that purpose with any man, or any engagement of a single recruit for the British military service although there were no obstacles to prevent it and there was ample time (3 months) within which to make the engagement, or any "wicked, corrupt and felonious" intent of plaintiffs in error, or any intercommunication of intent or meeting of minds with any person upon any prohibited matter, or any words or speech with any man as to any foreign enlistment. All of the "acts and things" done during this period are quite consistent with a perfectly lawful purpose—with the purpose of assisting fit British subjects home; and in no single instance was any unlawful engagement entered into or attempted to be entered into.

The third of these periods does not deal with "the acts and things now herein set forth as done by them"—the plaintiffs in error, but it deals with occurrences which took place after the men left San Francisco on June 16, 1915, and which took place without the State of California. Croft sent three telegrams from Chicago to Blair at San Francisco and these telegrams were received by Blair; but of what significance is this circumstance? Beyond the mere physical receipt of the telegrams, what other fact does the agreed statement of facts disclose concerning them? No pretense is made that Blair replied to them, or confirmed or ratified them in any way, or acquiesced in the contents of any of them even to the extent of sending the $100 telegraphed for; but is it not the law that before messages sent *to* a party can be used against him, there must be, not

only evidence that he received the messages, but also proof of some act, reply or statement evidencing acquiescence in their contents? What respectable authority takes the ground that the omission to reply is an admission of the truth of any matter stated in the message (*Jones, Evidence,* Sec. 269, p. 336)? Is it not the rule that a telegram not answered or acted on by defendant is neither admissible as *res gestae* nor as an implied admission of its contents (*Packer v. U. S.,* 106 Fed. 906)? And is not the admission of unanswered incriminating letters written by a *particeps criminis,* prejudicial error (*Marshall v. U. S.,* 197 Fed. 511)? Of what significance, then, is this telegram incident?

And again, still dealing with this third period, what paragraph of this agreed statement of facts establishes, in this criminal cause any relation, connection or privity whatever between these plaintiffs in error, or either of them, and "a man called Captain Roche" (whoever he may be), referred to as having been *"at"* (whatever that may mean) the British Consulate in New York City, before whom (though why no one can tell) *"some"* (was it two or twenty?) of the men "appeared"? While the agreed statement of facts can find no difficulty in disclosing the Consular instructions, yet it discloses no instruction whatever, given by anybody at San Francisco to any of these men, to go to, or report to, or "appear" before, either this misty man called "Captain Roche" or the British Consulate at New York City; and in addition to this, the conduct of the men on arrival in New York City showed that there was no such direction, because while, on the one hand, "some" (*36 Cyc.* 513)

only of them saw, not the British Consul at all, but "a man called Captain Roche", yet, on the other hand, this agreed statement of facts discloses no reason why the rest of the men did not "appear" at the British Consulate, if they had received any instruction to do so. And who was this fuliginous individual "called Captain Roche"? If he had been the British Consul at New York City, it would have been a very simple matter to have stated that fact in the agreed statement of facts; but the agreed statement of facts makes no claim or pretense that he was. If this person "called Captain Roche" had been authorized to represent or act for the British Consul at New York City, or for these plaintiffs in error, it would not have required the penetrating intellect of a Mansfield or a Marshall to have formulated a plain statement of that fact in the agreed statement of facts; but not even a dim intimation of any such fact is given in the agreed statement. How, then, upon any principle of justice, are these plaintiffs in error to be affected by any acts, conduct or declarations of this obnubilated stranger "called Captain Roche"—one whose identity or authority is nowhere fixed, and of whom no one can say whether he was a "Captain" in some army, or of some ship, or in some police department, or in some restaurant?

The references to the defendant Addis in the agreed statement of facts of this case are extremely meager and, we think, fall far short of sustaining the allegations of the indictment. He is first mentioned in paragraph 10, from which it appears that about March 15, 1915, Mr. Ross procured his services and those of

Messrs. Blair and Harris; and that they, at San Francisco "did the acts and things now herein set forth as done by them". It is nowhere agreed what those "services" were; it is nowhere agreed that these "services" were procured to carry out any pre-existing conspiracy to violate Section 10; and upon these points, this statement of the facts agreed to as the facts in the cause, is silent. And so, likewise, it is not agreed that the prior relations among Messrs. Blair, Addis and Harris were intimate; no agreement was reached upon the proposition of fact that there was any intimacy of any sort among these men, or any prior association among them, or, indeed, any acquaintance among them prior to March 15, 1915. So far as the agreed showing of fact carries us, nothing whatever appears to contradict the claim that, prior to March 15, 1915, these men were all strangers to each other—strangers meeting for the first time during a time of warfare characterized, among other things, by such a plenitude of spies, domestic and foreign, that no man could definitely determine whom to trust, if engaged in prohibited activities. In some of the cases, the facts of prior acquaintance, association or intimacy among persons accused of conspiracy, have caught the attention of the courts, as for example in *United States v. Greene,* 146 Fed. 803; 154 id. 401, 207, U. S. 596, and *U. S. v. Cole,* 153 Fed. 801; but in the cause at bar, no such facts were agreed to, and are wholly lacking.

It next appears from paragraphs 11 and 12 of the agreed statement of facts that, about March 16, 1915, Messrs. Blair, Addis and Harris rented a room in a San

Francisco building as an office, under the name of the British Friendly Association, and furnished it with rented furniture; and that thereafter, on May 27, 1915, Messrs. Blair and Addis removed this office to 68 Fremont Street, and returned the furniture to its owner. But the relation of the plaintiff in error Addis to this so-called office was of the most attenuated character. He never was in charge of this office at any time; up to May 27, 1915, when Harris left California (paragraph 18) and the United States (paragraph 10), the person in charge was Harris; and when, on May 27, 1915, the office was removed, Mr. Blair was in charge thereof (paragraph 13). It is nowhere agreed, moreover, that Mr. Addis knew anything of the consular notice of the naval reserve (paragraph 6), or of the newspaper article (paragraph 7), or of the responses thereto (paragraph 8); nor is it anywhere agreed as to what, if anything, the defendant Addis was or was not doing during the interval from March 15 to May 27, 1915—during that interval, he seems to have vanished.

We are then told something about the Addis' knowledge. Thus, it appears from paragraph 14 that Mr. Addis knew that letterheads, printed (by whom is unknown) for the use of the British Friendly Association, were used by Mr. Harris (prior to May 27, 1915, if one may hazard a guess) in the correspondence and other business transactions of the British Friendly Association—not, be it observed, that Addis knew the contents of the correspondence or the facts of the business transactions, not that this correspondence or these business transactions were in the remotest degree suggestive of

any corrupt or felonious conspiracy, but simply that Addis knew that these printed letterheads were used by Harris for the purposes mentioned. And it appears from paragraph 18 that Addis knew that the "register" originally kept by the consul was by him temporarily entrusted to Harris, accompanied by instructions which cannot have been prompted by any other motive than to obey the law. It is quite uncertain whether the defendant Addis knew of the facts stated in the latter portion of paragraph 18; but if we give to the prosecution the benefit of the doubt upon that point, the result will merely be that Addis knew that this register remained with Harris until he left California, when he turned it over, not to Addis, but to Blair, who subsequently returned it to the consul, by whom it was voluntarily offered in this cause for the purposes of the agreed statement of facts. While it does appear that Addis' name is upon this register, it nowhere appears that Addis did know that his name was there, or how the name got there, or under what circumstances or by whom it was placed there; nor does it appear that Addis ever saw or examined that register, or knew what, if any, use was ever made of it by the consul before or beyond entrusting it to Harris. And in paragraph 19, we are told, that Addis knew that Harris caused to be opened correspondence and communications with the parties named on said register. But here it is to be observed that Harris has never been accused of being a party to any conspiracy; no overt act has ever been charged to him; it nowhere appears that he ever combined or agreed with anybody to hire or re-

tain any man to go abroad to enlist in any military service, or that he ever assisted in doing so; it nowhere appears where he went when he left the state; it nowhere appears that he believed, supposed or presumed that any man would go abroad to enlist in any military service; nowhere is any disclosure made of the state of mind of Harris upon this point, the agreed statement of facts dealing solely in that regard with Messrs. Blair and Addis (paragraph 45). And when we turn to this correspondence, of the fact of which Addis knew, but of whose contents he was ignorant, the inquiry naturally presents itself as to what this correspondence was; whether it was historical, literary, scientific or lightly frivolous; whether it was incriminating or non-incriminating; whether it was concerned with or in any way violative of Section 10; whether Addis ever actually saw or examined it—but to all these inquiries the same reply must be given, viz.: that no fact or facts which could throw any light thereon are incorporated in the agreed statement of facts upon which this case proceeded below.

These three paragraphs of the agreed statement of facts (14, 18 and 19) deal with matters that Addis had "knowledge" of, although nothing whatever is agreed as to the origin, scope or intimacy of that "knowledge". But these paragraphs of the agreed statement of facts are of no moment in this cause; for the reason that the rule is thoroughly well settled that even approval of, or acquiescence in, or knowledge of, or preparation for, or sympathy with, an offense (if there be one), furnishes no basis whatever for affecting one with the pains and

penalties of complicity; even if he knew of the actual existence of a corrupt and felonious conspiracy to violate Section 10, but concealed it, still that course of conduct would not affect him with the pains and penalties of complicity.

8 Cyc., 621; approval or acquiescence;
5 R. C. L., 1063; approval or acquiescence;
Bird v. U. S., 187 U. S. 118; knowledge plus concealment;
12 Cyc., 446; knowledge plus concealment;
U. S. v. Lancaster, 44 Fed. 896; approval or acquiescence;
Patterson v. U. S., 222 Fed. 599; approval or acquiescence;
Marrash v. U. S., 168 Fed. 225;
Ford v. U. S., 94 Pac. (Ariz.) 1102;
Buffer v. People, 141 Ill. App. 70;
People v. Yannicola, 117 N. Y. S. 381;
1 Whart. Crim. Law., Last Ed. Sec. 266, n. 2;
1 Whart Crim. Evid., Last Ed. p. 922, n. 4, 5;
People v. Woodward, 45 Cal. 293.

That the knowledge ascribed to Addis—that Harris used printed letterheads of the British Friendly Association in correspondence and business transactions; that a register of names accompanied by consular instructions, was for a while in Harris' hands, and was then turned over to Blair, and was then returned to the consul who produced it here; and that Harris "caused to be opened" correspondence with persons named on the register—that this "knowledge" is of no value in the present cause, must, we believe, be conceded; if the

prosecution have a case independently of this "knowledge", then the "knowledge" is not material, because not needed; and if independently of this "knowledge" the prosecution have no case, then this "knowledge" cannot be resorted to for the purpose of eking out a halting and imperfect case. And it is to be observed that it is Harris, and Harris only, who is related to this correspondence; the only correspondence that we know anything of was carried on by him—carried on, that is to say, prior (though how long prior we are not told) to May 22, 1915; and nowhere is there a syllable of agreement in this statement that there was any correspondence after Harris left on May 27, 1915, and the "office" passed into the charge of Mr. Blair. And while, on March 16th and on May 27th, the agreed statement advises us that Addis was in San Francisco, yet as to where he was, or what he did, between those dates, no information is given by the agreed statement of facts—he may have spent the interval in Alaska or in Honolulu. Clearly, this "knowledge" could not have been either extensive or intimate.

Paragraph 15 of the agreed statement of facts tells us that Addis, with Blair and Harris, composed the British Friendly Association, which had no other business than to facilitate the transportation to New York of British subjects, sound in body and limb (paragraph 17). The function of this association, then, was limited to transportation, and to transportation, not to Europe, but to New York City. It is nowhere agreed by the parties that this association was in any way a hirer or retainer of men to go abroad from this country

to enlist in any military service, or that the association was in any way a hirer or retainer of men to go abroad from this country to enlist in any military service, or that the association assisted any such operation; it was a mere transportation facility—nothing more.

It appears from paragraphs 22 and 28 of the agreed statement of facts that the defendant Blair purchased certain railway tickets; and it further appears from paragraph 29 that these tickets were used in transporting to New York men "who had stood a physical examination by the defendant Thomas Addis, a physician"; and this is the extent of the reference here made to Addis. Neither time, place, occasion, nor character of that examination is anywhere disclosed; there is not a syllable to show that this "examination" possessed a single characteristic of a military medical examination of possible recruits; nor is there a syllable to show that any such thought was in Addis' mind at that time, or that he was acquainted with the requirements of a military medical examination.

Will any judicial mind attach the slightest importance to paragraph 38 of the agreed statement of facts, wherein the defendant Addis' name is next mentioned? Who this "unknown person" was; whether man, woman or child; at what wholly unidentified "certain times" this personage revisited the glimpses of Fremont Street; what "applicants" this nebulous individual "instructed"; what "requirements" were illuminated—all this passeth all human understanding; but what is clear is that this intermittent and ghost-like ambiguity was no representative of either Blair or Addis, as is

made plain by their conjoint repudiation conceded in the last clause of this motiveless paragraph.

And what special significance can be attached to paragraph 44? It is there stated that Addis knew that British soldiers and seamen are compensated for their services; but who is there that is ignorant of this fact? How can Addis be thought infected with participation in a corrupt and felonious conspiracy because he, along with innumerable other persons, knew a fact familiar to all the world, seems to us upon a par with the ghostly visitor of paragraph 38. But even here it is made clear that Addis was infinitely worse off in point of knowledge than many other persons not accused of any conspiracy whatever; because he is conceded to have been ignorant of the rate of daily pay, and also ignorant as to whether that rate had been increased. In other words, like many other men, he knew the bald fact that British soldiers and sailors, like soldiers and sailors everywhere, were compensated; and there his knowledge abruptly ceased.

It next appears from paragraph 45, not that Mr. Addis was conscious of any obligation upon the transported men to enlist in the British army as soldiers, not that they had ever agreed to do so—directly or indirectly, and not that any one of them was ever actually hired or retained for that purpose, not that there was any definiteness in any of their relations, such as is required by the *Kazinski* case, but that his mental attitude upon that point was wholly removed from any distinct or definitive understanding, and was one purely of conjecture and possibility merely—he "supposed, believed and pre-

sumed'' that the men would enlist in the British military service. Plainly, upon this subject-matter of enlistment, so far as Mr. Addis was concerned, he knew of no engagement by these men to enlist; he knew of no meeting of minds upon that point; and his mental attitude did not rise even to the altitude of a hope or an expectation. And this paragraph tells us that it was the intent of a majority of the transported men so to enlist; why did not Addis know that? Why was not this intent communicated to Addis? The very fact that his mental attitude is stated to be the halting one of ''supposition, belief and presumption'', shows plainly that this uncommunicated intent never did come to his knowledge; if it had, he would not have been supposing, or believing, or presuming. And while, in other paragraphs, the agreed statement of facts is very swift to tell us about Addis' ''knowledge'', yet no statement of that kind appears here; and it goes without saying that if Addis had any ''knowledge'' upon this matter of this intent of these transported men, that such a pregnant fact would have appeared prominently in the agreed statement of facts. This paragraph 45 effectually repels all thought of any common intent as among these parties; this indispensable ingredient, like others, is missing from this cause.

Paragraphs 46 and 47 merely show that Addis, like Blair, was told falsehoods by Cook and Stables; yet even here it should be remarked that the circumstances under which the falsehoods were told are not set forth so that the whole scene may be observed in its proper setting. And finally, from paragraph 55, we learn that no words

ever passed between Addis and any of the transported men upon the subject-matter of their foreign enlistment; is it any wonder that Addis is not charged even with a hope or expectation thereof, much less an intended purpose, and that his mental condition was a conjectural blend of supposition, belief and presumption?

What, then, does this agreed statement of facts shows as to the conduct of Addis? What is set forth here that Addis actually did? He and Blair and Harris rented a room in San Francisco (though why it required all three of them to transact this commonplace business, no one can tell) for an office that he was never "in charge" of; he assisted in the removal of this office to Fremont Street; he was a member of the British Friendly Association; and he made physical examinations of men who were transported to New York—though upon what principle it can be justly argued that because Addis made these physical examinations, therefore he was in a corrupt and criminal conspiracy with Blair, we cannot understand, especially since it does not even appear as an agreed fact that Blair knew anything about these examinations. But so far as any hiring or retaining of men for foreign enlistment is concerned, Addis never did that, nor did he ever have any "knowledge" of any such purpose by any one else. So far from knowing of any "distinct" (*Kazinski* case) agreement of hiring or retaining, his mental state upon that point was one of mere conjecture, mere supposition, belief and presumption. He never knew what purpose was intended by the men who went to New York; and no words ever passed between him and them upon the subject of enlist-

ment. It is all reduced to this, that while a member of the British Friendly Association, he assisted in the rental and removal of an office that he never was in charge of, and that he made physical examinations that do not appear to have been known of by either Harris or Blair. Is it to be said that, upon this attenuated wisp of fact, Addis is to be judicially determined to be *particeps criminis* with Blair in a corrupt and felonious conspiracy to violate Section 10? If there was any such conspiracy at all, it was, upon the verdict of this case, confined to Blair and Addis; but how can that be a conspiracy in which one does all, and the other does nothing, and in which no concert, whether of pre-arranged plan, or of action pursuant to that plan, can anywhere be discovered?

When we turn to the other side of the matter, and inquire what it was that Addis did not do, we perceive many things that he would normally have done had he been a conspirator, and our view that he was not a participant in any conspiracy, becomes thereby noticeably strengthened. Thus, we find, that he was never in charge of the office referred to (paragraph 13); between March 15 and May 27, 1915, he disappeared from sight completely; he never had possession of the consular register (paragraph 18); he carried on no correspondence (paragraph 19); he executed no business transactions (paragraph 14, 18); neither the consul, nor any other person, referred any "inquiring" individual to him (paragraph 20); not a single instance anywhere appears of the use by him of any of the blanks referred to in paragraph 21; he never purchased a single railway

ticket (paragraphs 22, 28); he had nothing whatever to do with the receipts or cards mentioned in paragraphs 32-33; he made no arrangements for anybody's board or lodging (paragraphs 34-37); he never designated any person to hold tickets or sustenance money on any occasion (paragraph 39); he received no telegrams from anybody (paragraph 41); he had no knowledge of the New York occurrences (paragraph 43); he received no checks and made no deposits (paragraphs 51-52); he had no knowledge of the intent of the transported men (paragraph 45); and he had no words with those men upon the subject-matter of their enlistment (paragraph 55). In view of all this, can it be reasonably urged that Mr. Addis was a *conspirator*—that he had entered into an actual corrupt and felonious conspiracy with Mr. Blair to violate Section 10? He originated nothing; he controlled nothing; he did no act or acts in conjunction with Mr. Blair such as we would expect him to do were he really a co-conspirator, and notwithstanding the stress that may be put upon the fact that he made these physical examinations, yet that circumstance, both in itself and as read in the light of all the other agreed facts, is entirely consistent with his freedom from complicity in any conspiracy. Men are not to be "supposed, believed and presumed", into felonious conspiracies; but if they are to be held as conspirators, they must be established to be such by evidence so convincing that it displaces the presumption of innocence and removes all reasonable doubt—nothing less than this will suffice.

But moreover: the making of these physical examinations is charged in the indictment as an overt act

done to further a pre-existing conspiracy; and yet it is precisely this pre-existing conspiracy that we dispute. As already observed, the existence of a conspiracy is not established by evidence of subsequent conditions which are consistent with its existence (*Waters-Pierce Oil Co. v. Van Elderen,* 137 Fed. 557, 571). Resort cannot be had to an alleged overt act to prove the conspiracy; you cannot argue back from the overt act to the prior conspiracy from which it sprang; the conspiracy itself is the foundation for, and source of, the subsequent, independent, overt acts, and you cannot infer from my participation in the overt act that I was a conspirator—you must prove me to have been a conspirator by independent evidence. In no case, indeed, can acts occurring after the conspiracy is formed be referred to for the purpose of proving the existence of the conspiracy; but the connection of the defendant with the conspiracy must be established by independent evidence.

2 Wharton, Crim. Law, Ed. 1912, Sec. 1673;
U. S. v. Hirsch, 100 U. S. 33;
U. S. v. McClarty, 191 Fed. 518;
U. S. v. McKee, 28 Fed. Cas. No. 15,685;
People v. Parker, 11 A. S. R. 578;
People v. Brickner, 15 N. Y. S. 528.

Not only this, but it must appear, as an agreed fact, that these physical examinations were the offspring of a previous conspiracy, of which conspiracy Addis was a part; but no such fact is agreed to here. That is to say, not only must the alleged overt act occur subsequently to the conspiracy itself, but it must also

be an act consciously intended to further the object of the conspiracy from which it sprang—the act must be done purusant to the prearranged plan (*U. S. v. Barrett,* 65 Fed. 62; *U. S. v. Hamilton,* 26 Fed. Cas. (15,288) 90). If it does not appear beyond all reasonable doubt that the alleged overt act could not have occurred, or did not occur, regardless of the specific conspiracy alleged; if the alleged conspiracy were not the origin of the alleged overt acts, without which those acts would not have been done; if, in a case of similar impression to this, it does not appear, that, beyond all reasonable doubt, the alleged overt acts actually did spring from a criminal concert between Messrs. Blair and Addis to violate Section 10 by hiring and retaining men for the foreign enlistment mentioned, or that such acts may not be attributed to some other motive—then, it could not be said with any justice, we venture to think, that the accused persons *conspired* to do such acts.

And speaking generally as to these alleged overt acts, what does the agreed statement of facts disclose about any of them to suggest that, *ex necessitate rei,* they must, beyond all reasonable doubt, have arisen from a corrupt and criminal conspiracy between Messrs. Blair and Addis specifically to violate Section 10? Could not such acts have occurred without such conspiracy? Was such conspiracy an indispensable and vital pre-requisite to the doing of such acts? Could not each of these men, of his individual and independent initiative, have done these acts, not for the purpose of criminally violating Section 10, but for the purpose of assisting

home physically fit British subjects—as they had a perfect legal right to do? Where is the proof—not the imagination, surmise, speculation or conjecture—but the proof that these two men conspired to do these pursuant to a prearranged plan to violate Section 10 in a corrupt and felonious criminal manner? Where is the proof of any antecedent joint action feloniously directed to this specific end? What paragraph of this indictment, or of the agreed statement of facts, exhibits any collection of co-operating acts by persons closely associated in the accomplishment of any criminal design? Where is there either allegation or proof that Messrs. Blair and Addis concurred with this criminal and specific intent, in the doing of any one significant or decisive act? Well, indeed, might the learned judge of the court below concede that these men believed that they were acting within the law!

Since, therefore, this cause has been whittled down to the two defendants, Blair and Addis; since, while a single individual may plan or plot alone, yet he cannot conspire alone; since it is the primary element of the offense of conspiracy that it requires at least two persons to conspire; and since a fair reading of this agreed statement of facts must acquit Dr. Addis of complicity in any conspiracy—it necessarily follows that no case is disclosed under this indictment, and that the jury below should have been instructed to find for these plaintiffs in error. We deny, therefore, that the agreed statement of facts shows any "*conspiracy*" between Messrs. Blair and Addis to violate Section 10, and that the allegation of the prosecution in that regard is negatived by the acts and conduct of

the parties as set forth in the agreed statement. Even were we to take the view most favorable to the prosecution, and assume that there was a combination between Messrs. Blair and Addis, then, the nature and character of that combination would be determined from what, in the agreed statement of facts, it is actually agreed that these parties actually did; and in this regard, eliminating the fine frenzy of a riotous imagination, and adhering to the record before us, the utmost that can reasonably be urged upon the facts agreed to as the facts in the cause, is that they combined to assist home physically-fit British subjects, but that they never combined to hire or retain, nor did they in point of fact ever hire or retain, any person or persons here to go abroad to enlist in the military service of the British King in violation of Section 10. Their motives for supplying passage home for British subjects, even were those motives identical in each of them, would be no sufficient foundation for an accusation of criminal conspiracy; if all who have motives to commit crime are therefore to be charged and convicted of crime merely for that, what man shall escape whipping? But there is no occasion whatever to charge these men of good character with criminal motives; and that should not be done except under a drastic compulsion which does not exist here.

We have referred to these plaintiffs in error as men of good character, and we urge that this should be borne in mind throughout the analysis of this agreed statement of facts. Any person accused of crime may, along and in connection with and in addition to other things, refer to his good character; it creates the im-

probability that a person of good character should have conducted himself as alleged; it creates a presumption that he did not commit the crime charged; it strengthens the presumption of innocence (*U. S. v. Wilson,* 176 Fed. 806); it is particularly significant in cases of circumstantial evidence and in those involving intent; it may alone create a reasonable doubt (*U. S. v. Wilson,* 176 Fed. 806; *Searway v. U. S.,* 184 id. 716); and if it be urged here that this agreed statement of facts is silent upon the subject now under consideration, the obvious reply is that an accused person need not call witnesses as to his general good character, but will be taken to be of good character until the contrary is exhibited in the proof beyond all reasonable doubt (*Mullen v. U. S.,* 106 Fed. 892; *U. S. v. Guthrie,* 171 id. 528).

HIRING OR RETAINING.

The agreed statement of facts fails to establish beyond all reasonable doubt any hiring or retaining of men by the plaintiffs in error in violation of Section 10 of the Federal Penal Code, or any conspiracy to hire or retain men in violation of that section.

In his charge to the jury, in the instant cause, the learned judge of the court below referred to a single decided case, namely, the *Hertz* case, reported in 26 Fed. Cas. No. 15,357. But in referring to this case, the learned judge quoted, rather from the argumentative portion of the opinion than from the portion which formulated the settled conclusion of the court. Unfortunately, this procedure presents but a partial

view of the subject. No reference was made to the circumstance that the court in the *Hertz* case found an analogue in "the hiring and retaining of a servant," which is pre-eminently a transaction based upon a mutual definite agreement, mutual assent and intent, and the intercommunication of such assent and intent, as well as upon the presence of a consideration; and a transaction in which it frequently happens that, while the consideration may be unimpeachable, yet the other features of the proposed arrangements may be repugnant and unconsented to. Again, in the *Hertz* case, in a passage to which the learned judge in the court below made no reference, the court said:

> "If there be an engagement on the one side to do the particular thing, to go beyond the limits of the United States with the intent to enlist, and on the other side an engagement that when the act shall have been done, a consideration shall be paid to the party performing the services or doing the work, the hiring and retaining are complete."

Does not this passage plainly indicate the necessity for an agreement and an intent, as well as a consideration? How can any arrangement of this character be arrived at unless the minds of the parties meet as to the terms of the agreement? And in a case in which, upon the one side, there was nothing more than supposition, belief and presumption, and upon the other an individual intent of the members of a majority only—in a case in which the intent of that majority never was communicated to the other parties, but remained "individual"—and in a case in which no words passed between the parties upon the subject of the alleged hiring and retaining (paragraphs 45, 55)—in such a case

as this, how, in reason and justice, can it be said that there was either an agreement of hiring and retaining, or any attempt at any agreement of hiring or retaining?

And in another passage in the *Hertz* opinion, not referred to by the learned judge of the court below, it was further said:

> "The meaning of the law, then, is this: that if any person shall engage, hire, retain or employ another person to go outside of the United States to do that which he could not do if he remained in the United States, viz. to take part in a foreign quarrel; if he hires to go, knowing that it is his intent to enlist when he arrives out—to enlist and engage him, or carry him, or pay him for going because it is the intent of the party to enlist; then the offense is complete within the section."

Here, we find the learned judge associating as synonymous such words as "engage, hire, retain or employ"—all of which are words which rest upon and presuppose the concept of a definite agreement, and recall the language of the Chief Justice of the United States to the effect that

> "To be 'employed' in anything means, not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it."
>
> Per Taney, C. J., in *U. S. v. Morris,* 39 U. S. (14 Pet.) 475.

And this passage likewise presupposes, as an ingredient, that common intent of the parties which nowhere appears in the present cause, whether in the indictment or in the agreed statement of facts.

But the *Hertz* opinion proceeds, in another passage not referred to by the learned judge of the court below:

> "Every resident of the United States has a right to go to Halifax and there to enlist in any army that he pleases; but it is not lawful for a person to engage another here to go to Halifax for that purpose.
>
> I trust I make myself sufficiently clear to the jury that they may comprehend the distinction. It is the hiring of the person to go beyond the United States, that person having the intention known to the party hiring him, and that intention being a portion of the consideration before he hires him, that defines the offense."

Here, again, we have a direct recognition of the ingredients of definite agreement, intent of the party hired, knowledge of that intent by the party hiring, and the intent of the party hired forming part of the consideration before the hirer hires him. When with this statement of the law in mind, we turn to the collection which are stipulated to be "the facts in the cause", and upon which this case must turn, where do we find therein any stipulation, not merely of the existence of a definite agreement, but of any effort to enter into any definite agreement? There is, it is true, in paragraph 45, a stipulation that it was the individual intent of a majority of these men to enlist; but there is no stipulation that they were hired to enlist; and the only intent ascribed to them is an intent which is "individual", a term which repels all thought of a community of intent, or meeting of minds. An "individual" intent is one which is peculiar to a single or separate person; it is opposed to "collective" or "common"; it is opposed to associated action or common interests; and an "individual intent" is an intent which is purely personal and isolated and unshared by others. Any standard dictionary will reinforce this contention; and

in the construction of this agreed statement of facts, we do not believe that this court will give to its language any other than that "ordinary signification" which was favored by the learned judge of the court below. And where, from the beginning to the end of this agreed statement of the facts in the cause, is the fact agreed to that these plaintiffs in error had knowledge of the individualistic intent of any one of these men; and where is there a single syllable of agreement that this purely "individual intent" formed any part of any consideration of any agreement between these plaintiffs in error and any one of these men. The agreed facts are that the mental attitude of the plaintiffs in error never developed beyond the speculative, hypothetical, theoretical, suppositional, putative conjecturality of supposition, belief and presumption (paragraph 45), and that no speech was exchanged at any time between them and these men upon the subject-matter of foreign enlistment (paragraph 55). How are these agreed facts, *inter alia,* to be squared with the conclusions of the learned judge in the *Hertz* case?

But the *Hertz* case is not the sole contribution made by Federal judges to the literature of this subject. We cannot resist a certain sense of surprise that the *Kazinski* case was not referred to by the learned judge below, and its opinion analyzed with a view to obtaining the benefit of the light which it throws upon the subject. That case fully supports our views as to the nature of hiring or retaining, and emphasizes the necessity for an agreement between the parties—for that meeting of minds between them which is con-

spicuous by its absence here. Thus, in that case, it was said:

> "To constitute the offense of enlisting here, it requires the consent of the party enlisting; and so also the hiring or retaining a person to go abroad with intent to be enlisted, requires assent and intent on the part of the person hired or retained. It is to be further observed that the word 'retain' follows the word 'hire'. We should not expect to find it used in a meaning opposite to that of 'hire', and opposite to its own usual signification. Suppose it to be used in the sense of detain, and apply it to the enlisting of men here. It at once becomes impossible. It must be used in a sense that will apply to both. The nearest term is probably 'engage', and it is used like the word 'retaining' when speaking of retaining counsel. It is an 'engaging of one party by the other, with the consent and understanding of both'. * * *
>
> A distinct hiring or retaining by the defendants must be shown. It might be done through agents, but these agents must be shown to be agents for this purpose and acting under the defendants" (26 Fed. Cases 15508, p. 685).

But what paragraph of the agreed statement of facts exhibits any "consent of any one of these men to go abroad for the purpose of foreign enlistment? "Consent", as an ingredient here, is not the "individual intent" of paragraph 45; but it means the expressed and communicated assent of a man, delivered to the person engaging him; it involves affirmative action, not mere supine passivity; and it involves "understanding". The phrase "hire and retain" as explained in the *Kazinski* case, carries with it the thought of the engaging by one party of the other with the consent and understanding of both; the transaction must be an active one; each party must be a factor in its accom-

plishment; mere "individual", undisclosed and uncommunicated "intent" is not enough,—that might well exist and yet, for one reason or another, "consent" be withheld; and in order to effect any hiring or retaining, there must be that common consent and understanding upon which we have persistently insisted, and without which we cannot conceive any meeting of minds. This *Kazinski* case will well repay reading, and we cannot understand why the learned judge below failed to refer to it except upon the theory which we refer to in our thirtieth assignment of errors (Record p. 194).

Plainly, the transaction of hiring or retaining, as condemned by Section 10, is composed of the following ingredients, at least, entering into a transaction performed within the limits and jurisdiction of the United States, viz: parties, intention, consent, understanding, agreement, consideration, and subject-matter. In this connection, we think it should be pointed out that an agreement or contract

> "may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other".
>
> *Dartmouth College v. Woodward,* 17 U. S. (4 Wheat.), 518, 656.

No agreement or contract exists where

> "the mutual assent, the meeting of the minds of both parties, is wanting. Such assent is vital to the existence of a contract. Without it there is none, and there can be none".
>
> *Mutual Life Ins. Co. v. Young,* 90 U. S. (23 Wall.) 85,

and in matters of agreement or contract,

> "the obligation in such cases is correlative. If there is none on one side, there is none on the other. The requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority. * * * The law involved is expressed by the phrase, 'it takes two to make a bargain' " (id.).

No man, indeed, is bound by any stipulation to which, as put, he does not consent; there can be no meeting of minds unless each party has in mind the same proposition; the minds of all parties must be at one with the proposition as made, in all its terms; and

> "in making a contract, parties are as important an element as the terms with reference to the subject matter. Mutual assent as to both is alike necessary. * * * With (its) assent, a thing was wanting which was indispensible to the continuity of the contract".
>
> *First National Bank v. Hall,* 101 U. S. 43;
> *Tilley v. Chicago,* 103 U. S., 155.

A unilateral act is one in which there is one party whose will is operative, but a bilateral act is one which involves the consenting wills of two or more distinct parties; all agreements which create an obligation by way of consent are bilateral; and it may not improperly be said that the term "contract", being derived from *contrahere,* involves the idea of binding two persons together by the *vinculum juris* of an obligation. It is observed by Savigny (*Modern Roman Law,* Sec. 140), that a contract is

> "the concurrence of several persons in a declaration of intention whereby their legal relations are determined".

This definition has the merit of reminding us that the agreement must, to be an agreement at all, be one in which the parties contemplated the creation of a legal relation between or among themselves; but how this is to be accomplished where one side merely supposes, believes and presumes (agreed statement of facts, paragraph 45), where the other side never communicated an "individual" intent (id.), and where both sides wholly fail to exchange a word concerning the alleged subject-mater (id., paragraph 55), we are wholly unable to understand. The agreed statement of facts disclosed no unlawful proposal by either of the plaintiffs in error to any man; the taking by these men of the train to New York is more consistent with the theory that they were assisted to return there, than it is with any theory that they were hired and retained as British soldiers; no consent by any of these men to any hiring and retaining, nor any promise by them to serve as British soldiers, in contradistinction to their acceptance of assistance so far as New York, anywhere appears in this agreed statement of facts; the supplying of passage or other assistance to these men is not a hiring or retaining of them as British soldiers; and

> "if the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached".
>
> *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

In order, then, to constitute a hiring or retaining, within the meaning of Section 10, there must have been a common intention to accomplish such hiring or retaining,—there must have been in the minds of both parties

to the transaction a fixed direction to the particular object, a determination to act in the particular manner. But there must have been something more than this intention; the intention must itself ripen into a promise. The intention is a mere emotion or operation of the mind, and a purpose to effect a certain result, and determination to act in a particular manner. But it is to be distinguished from a promise. A promise is an agreement to carry a purpose into effect, which gives to the person to whom it is made a right to demand the performance of the particular purpose; "promise" is not synonymous with "expectation", or "hope", or "supposition", or "belief", or "presumption"; it means, if it mean anything, "agreement", "obligation", "undertaking". As remarked by the Supreme Court of Indiana,

> "there is an essential difference between an expressed intention to do a given thing, and an absolute undertaking to do it".
>
> *Joyce v. Hamilton,* 12 N. E. (Ind.) 294, 295,

and in an Arkansas case it was observed

> "that the jury were advised that a mere expression of intention would not support a promise. * * * It is not easy to define the difference between a promise and an expression of intention. Perhaps it lies in this, that the latter is merely an evidence of the condition of the mind with regard to future action, which concerns only the individual entertaining it, and which no one has the right to require him to execute, while the former is intended to give some third person an assurance which they will be expected to rely on, that the act will actually be done, or refrained from".
>
> *Lanagin v. Nowland,* 44 Ark. 84, 89.

And this distinction is recognized in another case, wherein the court remarked that

> "an intention is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry that purpose into effect".
>
> *Shockey v. Mills,* 36 Amer. Rep. 196,

and so, likewise, in a frequently cited case, it is remarked:

> "The expression of an intention to do a thing is not a promise to do it. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking to carry the purpose into effect. The intention may begin and end with the person who forms it. A promise supported by a good consideration can only be rescinded by the act of both the parties to it—for to make a binding promise, there must be a promisee as well as a promisor."
>
> *Stewart v. Reckless,* 24 N. J. Law, 427, 430;
>
> *Holt v. Akarman,* 86 Atl. N. J. 408.

From these considerations, we submit that it becomes entirely obvious that an uncommunicated intention is entirely futile. We have seen that the mutual or common assent to the parties of the same proposition—the meeting of their minds thereon—is indispensable to an agreement; and that an individual intention, even though expressed, does not amount to a promise. The mental processes of an individual, nourished *in petto,* cannot bind another; "the thoughts of one party cannot be proved to bind the "other" (*Thomas v. Loose,* 6 Atl. (Pa.) 326, 329; *Spradley v. State,* 31 So. (Miss.) 534); "uncommunicated intentions are not the subject of proof" (*Wheeles v. Rhodes,* 70 Ala. 419; *Stewart v. Whitlock,* 58 Cal. 2); and where the question is whether

an agreement was entered into, the uncommunicated intent of one of the parties is entirely immaterial (*Brown v. Hickey,* 68 Iowa 330; *Herring v. Skaggs,* 34 Amer. Rep. 4). Indeed, upon an issue as to whether any agreement was entered into, we submit that the "majority", referred to in paragraph 45 of the agreed statement of facts, would not even be permitted to testify to their individual, uncommunicated intentions (*Herring v. Skaggs,* 34 Amer. Rep. 4, 8; *Williams v. State,* 26 So. (Ala.) 521). In a word, in order that there may be an agreement at all, whether of hiring or retaining, or otherwise, the parties must have a distinct intention common to both, doubt or difference being incompatible with agreement. And this intention must ripen into such a promise as, to apply the language of the *Kazinski* case, is known to, understood by, and participated in by both of the parties to the transaction. To sum it up in the language of the District Court of Appeal,

> "a contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract".
>
> *Amer. Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 137;

and see also

> *Harvey v. Duffy,* 99 Cal. 401.

But the agreed statement of facts nowhere measures up to this standard. In paragraph 55 it plainly advises us of the absence of any express agreement of any

hiring or retaining; but, in this criminal case, proceeding upon a deliberate and carefully drawn written statement of the facts in the cause, is an agreement of hiring or retaining to be guessed at? If an express contract of hiring and retaining would contravene Section 10 of the Federal Criminal Code, will an agreement itself, denounced by the statute as criminal, be imported by any process of argumentation into this cause? "It is not to be presumed the parties intended to make a contract which the law does not allow" (*Bank of Kentucky v. Adams Express Co.,* 93 U. S. 174). "The commission of a crime is not to be presumed" (*U. S. v. Amedy,* 24 U. S., 11 Wheat. 392); and is it not obvious, as to the argumentative importation into this cause, of a criminal agreement, that "such a conclusion could only be reached after an indulgence in surmises, speculations and conjectures not countenanced by criminal law" (*People v. Porter,* 104 Cal. 415, 417; *Cleveland, etc. Ry. v. Miller,* 49 N. E. (Ind.) 445? Neither suspicion (*People v. Thompson,* 50 Cal. 480; *People v. Hoagland,* 138 id. 338, 341; *Wills v. Central Ice and Storage Co.,* 88 S. W. (Tex.) 265); nor presence at the *locus delicti* (*People v. Koening,* 99 Cal. 574); nor association with other guilty persons (*People v. Maxwell,* 24 Cal. 14; *People v. Stephens,* 68 id. 113; *State v. Wheeler,* 105 N. W. (Iowa) 374; nor opportunity (*People v. Tarbox,* 115 Cal. 57), will suffice to establish the commission of a crime; "the sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass" (per Caldwell, J., in *Boyd v. Glucklich,* 116 Fed. 131); and the clear result of all the authorities is that the commission of the

crime charged must be established to the exclusion of all reasonable doubt, that the defendant is entitled to rest in security upon the presumption of innocence, and that he cannot be called upon to explain anything (*Chaffee v. U. S.,* 85 U. S. (18 Wall.) 516; *People v. Struber,* 121 Cal. 432). The presumption of innocence is not an empty phrase without meaning or effectiveness, but it is in the nature of evidence for the defendant (*Coffin v. U. S.,* 156 U. S. 432; *Amis v. State,* 26 So. (Ala.) 524; *Harris v. State,* id. 515. "The presumption of innocence is one of the strongest disputable presumptions known to the law" (*Fox v. Mining Co.,* 53 Pac. (Cal.) 37); and since the law does not presume that crime has been committed, or that the accused person has committed it, the law puts the burden of proof upon the accuser, and requires the party making a charge to establish its truth beyond all reasonable doubt, no burden being imposed upon the accused to clear himself of anything—as already pointed out, he cannot be called upon to explain anything. Evidence, therefore, which leaves it uncertain whether the crime charged was committed, or whether there is sufficient cause to believe that the accused person committed it, is insufficient for any judicial purpose (*Ward v. State,* 28 S. E. (Ga.) 982; *Perkins v. State,* 23 So. (Miss.) 579; *Mitchell v. State,* 29 S. E. (Ga.) 435; *Boyd v. State,* 43 So. (Ala.) 204; and consequently, where the facts of a case are consistent with varying theories, a judicial tribunal will adopt that construction which makes for innocence (*The Bothnea v. The Jahnstaff,* 15 U. S. (2 Wheat.) 169, 177; *Vernon v. U. S.,* 146 Fed. 121;

U. S. v. Hart, 78 id. 868, affirmed, 84 id. 799; *U. S. v. Richards,* 149 id. 443; *Tucker v. U. S.,* 224 id. 833; *People v. Bonney,* 98 Cal. 280; *People v. DeFore,* 64 Mich. 693; *People v. McCard,* 40 N. W. (Mich.) 784).

If such agreement of hiring or retaining was ever entered into, if this alleged conspiracy, after months of time and opportunity, succeeded in capturing a single recruit, why was not that fact stated in this agreed statement of facts? The truth, however, is that notwithstanding this alleged conspiracy, notwithstanding the ample time, unrestricted opportunity, consular register, correspondence, office, and other paraphernalia, yet in not one solitary instance was even an abortive attempt made by the so-called conspirators to hire or retain anybody to become a British soldier; and we challenge our opponents to lay a finger on any paragraph of the agreed statement of facts which contradicts or attempts to contradict this statement.

We submit it to be a most convincing circumstance, making against this accusation of conspiracy, that in no single instance was there any agreement, understanding, contract or obligation of any sort, upon which the minds of the parties met, whereby any man was engaged to enlist in the military service of Great Britain as a soldier. The charge made here is that of a conspiracy to hire or retain men for this foreign enlistment. The hiring or retaining of men for that purpose was, upon the theory of this prosecution, the object upon which the alleged conspirators were concentrating their energies, and which they were endeavoring to accomplish; but while a conspiracy, the existence of

which has once been proved beyond reasonable doubt, need not perhaps be shown to have been successful, yet, where the issue is as to the very existence of any conspiracy whatever, the fact that the parties accused of the alleged conspiracy did not do, or attempt to do, the thing that it is said they conspired to do, when there were no obstacles to prevent them from doing that which, *ex hypothesi,* they were endeavoring to accomplish, negatives the alleged existence of the concerted conspiracy. In the cause at bar, the defendants had ample time,—three months at least—within which to hire or retain men for foreign enlistment, if there had been any such conspiracy; but not only does the agreed statement of facts wholly fail to disclose any promise on the part of a single individual to enlist upon arrival in Great Britain; not only does it wholly fail to disclose the faintest trace of any solicitation by these defendants of any man or men for foreign enlistment, but it affirmatively shows that no speech was had upon this subject of foreign enlistment between any of these defendants and any of the men transported to New York. We do not now ask whether there is any showing of a combination of British subjects to send home any of their fellow countrymen who may require such assistance, and as incidental thereto to provide sustenance and transportation for such persons (paragraphs 22-30, 34-35, 39-40), because it is not criminal for a British subject to return home if he desired to do so; nor is it criminal to give him assistance for that purpose if he require it; nor is it criminal for British subjects to combine to aid and assist their fellow

subjects to return home if those fellow subjects desire to return home and require assistance to enable them to do so; and all this because, as the Circuit Court of Appeals points out through Judge Sanborn, it is not criminal to do, or to conspire to do, that which the law does not prohibit (*Fain v. U. S.*, 209 Fed. 525, 531). But we do ask for the showing here of any corrupt criminal conspiracy to commit against the United States the offense of hiring and retaining men here to enlist in the British military service; and we ask for a showing of that degree of convincing power which satisfies the mind of guilt beyond all reasonable doubt. As observed by the present chief justice:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. * * * Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn."
>
> *Coffin v. U. S.*, 156 U. S. 432, 453, 458-9.

It is pointed out by Mr. Justice Harlan in following the *Coffin* case, that:

> "The presumption of the innocence of an accused attends him throughout the trial and has relation to

> every fact that must be established in order to prove his guilt beyond reasonable doubt."
>
> *Kirby v. U. S.*, 174 U. S. 47, 55;

And in the *Davis* case, the same learned justice remarked that:

> "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime."
>
> *Davis v. U. S.*, 160 U. S. 469, 487;

and see also the remarks of Mr. Justice Clifford in *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266. In no courts, indeed, are these rules more rigidly enforced than in the national courts; and it is the settled doctrine of the national courts that, in a criminal cause, the circumstances must be of such a character as to exclude every reasonable hypothesis except that of guilt; and that where the circumstances are as compatible with innocence as with guilt, there arises the reasonable doubt that requires an acquittal (*U. S. v. Hart*, 78 Fed. 868; affirmed 84 id. 799; *U. S. v. Richards*, 149 id. 443; *Tucker v. U. S.*, 224 id. 833).

As we have already pointed out, the notice to the naval reserves, and the newspaper comments thereon, are too remote to have any connection with the conduct of plaintiffs in error; and besides, they were neither charged with, nor convicted of, conspiring concerning British naval reserves (paragraph 4, Trans. p. 100). Their conviction relates only to soldiers. But turning

to those loose sheets which have been described by the term "Register", what are the disclosures as to them?

On this register were entered the name and address of persons calling at the British Consulate concerning military service; the British Consul-General caused this register to be kept between August 1, 1914, and March 18, 1915. On the last date to the knowledge of plaintiffs in error it was *temporarily* entrusted by the British Consul-General to Harris, accompanied by the instructions referred to; Harris kept it until May 27, 1915, when he turned it over to Blair, who in turn kept it for a while and then returned it to the British Consul-General; Harris to the knowledge of plaintiffs in error caused to be opened correspondence and communications with the parties named on said register; in his correspondence Harris used printed letterheads, captioned "British Friendly Association, 59 Sherwood Building, 21 Pine Street, San Francisco, Cal.", but containing no further address or information.

For further information regarding this register, Exhibit C, we must look at the register itself. The original of this Exhibit C has been returned to this court with the transcript of record, and photographic copies of the original exhibit have been furnished to the judges of this court. This exhibit consists of 23 loose pages of the size of legal cap, written on one side only, containing names written therein by hand, with certain headings, as "Surname, Christian Name, Rating & No., Address". Sometimes "Rating & No." becomes "Rating", again it becomes "Rating, Experience, etc." On some pages, all headings are omitted, but the respec-

tive columns of information are preserved. The names do not appear to be in the handwriting of the persons registered. The first 3 pages are headed "Volunteers", the next 3 pages are headed "Army Volunteers", the next 2 pages are headed "Army Volunteers & Ex-Soldiers", then a single page, headed "Volunteer Army", is followed by a single page headed "Army Volunteers & Ex-Soldiers", then come 5 pages headed "Army Volunteers", afterwards are 2 pages headed "Army Reserve", 1 page headed "Royal Naval Reserve", another page headed "Naval Reserve", 2 others headed "Royal Naval Volunteers", and the last 2 pages are labelled "Volunteers for Nurses".

The agreed statement of facts shows: that some of the railroad tickets were used in transporting the men whose names are mentioned in the indictment (Par. 30, Trans. p. 106); that these men signed a receipt, the originals of which are designated "Exhibit E" (Par. 32, Trans. p. 106; Exhibit E, Trans. pp. 116-120); that the British Friendly Association (the plaintiffs in error) caused to be transported in the manner set out in the agreed statement of facts 155 men, but their names are not given (Par. 31, Trans. p. 106), so there is no way to connect any of these 155 men directly with this register. The men named in the indictment whose receipts are produced in the agreed statement of facts in alphabetical order are as follows:

Albutt (Albert) Harry; Berkett (Burkett) W.; Bond, F.; Boyd, Harry; Casey, Patrick; Cooke, Frank G.; Devlin, Patrick; Duncan, Rudolph; Gorman, Harry; Grenney (Granney), Wm. V.; Hill, Claude R.; Johnson,

Robert; Jolly, W.; McCubbin, Hugh; McDonough (McDonald), Jo; Purtell, E.; Sage, Horace (R. O.); Sualtrough (Qualtrough), Edmond; Smith, James; Stables, Wm.; Stanley, J. L.; Steen, J. D.; Sullivan, James B.; Wilkins, Paul E. (O.); Wilson, James T. (Trans. p. 4; Exhibit E, Trans. pp. 116-120). The names given above are as they appear in the receipts signed (Exhibit E). Where the names or initials set forth in the indictment differ from the names found in the receipts, the names or initials as they appear in the indictment are given above in parenthesis. On the first page of this register (Exhibit C) under the heading "Volunteers", is found as the second entry the following: "McCubbin, Hugh, Lt. Late Prince of Wales L. H." (undecipherable memorandum) "Brigade, Boer War", and under the address column is given "British Consulate, S. F." Also, on this page as the fourteenth entry appears the name of R. K. Blair. On the 18th page of this register, labelled "Royal Naval Reserve", under the head of "Deserters" as the 7th entry occurs "Watson, Robert, H. M. Bedford, San F., Oct. 23d/09" (undecipherable memorandum) "Kearney & Wash." Is this the Robert Johnson who was a deserter from the British navy and who served in the American navy under the name of Watson (Par. 48, Trans. p. 110)? On the 22nd page of this register, under the heading "Volunteers for Nurses" is found as 12th on the list the name of Thomas Addis. No other names of any persons connected with the case have, after careful search, been found upon this register.

Let us take the case of McCubbin. It may be argued that some time between August 1, 1914, and March 18, 1915, he approached the office of the British Consul-General and volunteered for service in the British army and was listed there as a volunteer for such service; that later, some time before May 27, 1915, Harris wrote him and advised him that the British Friendly Association was prepared to send him as far as New York on his way to England if he still desired to go; that he responded to this communication, was examined, found physically fit, given $16.10 (Trans. p. 117) for sustenance in San Francisco and on the way to New York, and about June 16, 1915, sent to New York at the expense of the British Friendly Association; and that acceptance of such assistance under these circumstances raised an implied obligation on his part to go abroad with intent to be enlisted as a soldier in the British army; and that therefore in this case an implied contract of "hiring or retainng" is established. Of course it would be essential to this argument to maintain that McCubbin knew that he had been listed as a "volunteer" in the office of the British Consulate; that he knew that Harris was aware of this; that therefore he assumed that it was because he was so listed that Harris communicated with him, and that assistance in the way of sustenance and transportation were offered and furnished him; and that plaintiffs in error were aware of this state of mind in McCubbin. Did the record before the court justify the inferences necessary to sustain this argument?

As McCubbin's name is second on the register (Exhibit C) which the British Consul-General caused to be kept between August 1, 1914, and March 18, 1915 (Par. 9, Trans. p. 101), McCubbin must have been in the crowd referred to in the news item which reported at the Consulate August 2, 1914 (Par. 8, Trans. p. 100; Exhibit B, Trans. p. 113).

As the register was not kept after March 18, 1915, but was then turned over to Harris (Par. 18, Trans. p. 102), and as Harris left the state, and turned the register over to Blair, May 27, 1915 (Par. 18, Trans. p. 103), and as Harris was the only person who caused correspondence and communications to be opened with the parties named on the register (Par. 19, Trans. p. 103), McCubbin, if communicated to at all, must have been written some time between March 18, 1915, and May 27, 1915. As apparently the British Consulate, S. F. (see Exhibit C, p. 1, opposite McCubbin's name) was the only known address of McCubbin, if any letter was sent him, it probably was addressed to him in care of the British Consulate. As McCubbin went east about June 16, 1915, the date of his receipt (Trans. pp. 117, 118), and as he only receipted in all for $16.10, or $7.00 over what was necessary for his sustenance on the way to New York, he must have been one of those who did not go to 735 or 735-A Harrison Street (only *some* of the men were boarded and lodged at these places (Pars. 35, 36, 38, Trans. pp. 106-107); and therefore he could not have reported much before June 9, 1915, as $7.00 would just about provide for him for one week. Therefore, it must be that

McCubbin made his inquiry concerning military service at the Consulate August 2, 1914; if written to at all, it must have been between March 18, 1915, and May 27, 1915; and he went east about June 16, 1915. But, if written to at all, as his name appears second on the list, it is not likely that McCubbin was the last man written to by Harris on May 27, 1915. However this may be, it may be plausibly urged that as the letter might be sent to McCubbin in care of the British Consulate, the explanation for his failure to inquire at the British Friendly Association before June 9, 1915, may be that he did not call at the British Consulate for any mail before that date. And it may be argued that the fact that he was addressed at the British Consulate would suggest to McCubbin that his name was secured by Harris from the Consulate, and that therefore McCubbin would assume that Harris knew about his offer to volunteer for service in the British army, made nearly a year before.

Now in the first place it does not appear that McCubbin was written to at all. The only fact asserted in the agreed statement of facts is that Harris, with the knowledge of plaintiffs in error, "caused to be opened correspondence and communications with the parties named on said register" (Par. 19, Trans. p. 103). This is not equivalent to a statement that a communication was sent to every man there named. It may be that as the only address given by McCubbin was the British Consulate, Harris did not write him at all, assuming that he would not get the letter unless he called at the British Consulate, and that, if he did

call there, he would be referred, like others, to Blair (Par. 20, Trans. p. 103). The penciled question marks appearing before and after McCubbin's name on the register (Exhibit C) give added sanction to this assumption. And if no letter was sent to McCubbin, and if calling at the British Consulate in the Hansford Building about June 9, 1915, and inquiring of opportunities for getting home, he was told that the Consulate could do nothing for him, but was advised that the British Friendly Association, located at 68 Fremont Street, might do something for him, then there would be nothing to connect the British Friendly Association in McCubbin's mind with his previous offer to serve in the British army, if he ever made such an offer. Having arrived at the office of the British Friendly Association, he is asked no direct question about his military service. Following the card, printed for the use of the British Friendly Association (Trans. p. 104, Par. 21), which was made out for, not by, McCubbin (Trans. p. 106, Par. 33), the questioner would ask, "What is your present occupation?" and this question would be followed by the request to state his "previous occupation and experience at home or elsewhere". In replying to this last statement, the military experience, if McCubbin had or claimed to have any, would be given merely as an incident of the rest. True, as that is all in which the plaintiffs in error were interested, that is all, perhaps, that they would record on the card, but it does not appear that McCubbin knew this or ever saw the card, or what was written upon it. But after the card was made out,

McCubbin was requested to submit to physical examination. This might cause the thought to flash though his mind, "These people are not going to help me out here, or pay my passage to New York unless I agree to get to England or Canada and enlist". But if he had any such thought it would ultimately have faded for he waited to be asked for a promise to this effect in vain, as no such promise was solicited. In the absence of any request for such a promise, McCubbin could not have but felt that so far as the plaintiffs in error were concerned, they were assisting him to return to England, under conditions that would leave him on arrival there a free agent to do as he pleased. Whether a man on arriving in England was to go into the army or in the navy, or in the munition factories, or in other branches of the national service, or was to enter civil industrial life, in the midst of such a war as then raged, it certainly was not the time to be aiding any men home, who were not physically fit and "sound in body and limb".

It does not appear what was the character of this physical examination. Many a man might be pronounced "sound in body and limb", or "physically fit", or "physically suitable", who would not be able to pass an army examination for enlistment. And no one would recognize the difference more quickly than an ex-soldier. The examinations were conducted by Addis (Trans. p. 106, Par. 29); but it does not appear that he ever had any military service, or knew the army standards of physical examination.

But all these speculations, after all, are useful only to determine one question. Was the conduct of plaintiffs in error such as to put McCubbin under obligations to leave the country with intent to be enlisted in the British army, as a soldier, in consideration of the assistance they were offering him? Unless McCubbin expressed his sentiments to the plaintiff in error, it is immaterial what they were. And there is no showing of anything said to the plaintiffs in error on the subject of enlistment. Did the plaintiffs in error so shape their course as to place a tacit promise in McCubbin's mouth to agree to leave the country with intent to be enlisted as aforesaid? On the contrary, it must be apparent that their purpose was to so shape their course as to leave McCubbin free of any obligation whatever; and this not for the purpose, as expressed by Judge Dooling, "to secure here men to go beyond the limits of the United States, without appearing to have violated the law" (Trans. p. 151), but for the purpose of obeying the law. Anxious as they were to aid men to go home who, they hoped, would enlist in the British army, or in the language of the agreed statement of fact (Trans, p. 109, Par. 45), who, they "supposed, believed and presumed", would do so, they were equally anxious to avoid violating the American laws, and therefore asked no direct promise from the transported men, and so directed their course as to avoid raising any tacit or implied promise in them, and thus avoided making any contract of "hiring or retaining" these men for the prohibited purpose in violation of law. By no species

of reasoning can an implied contract of "hiring or retaining" McCubbin to go out of the country with intent to be enlisted or entered in the British army as a soldier be construed out of the circumstances that he was subjected to a physical examination and was asked about his previous occupation and experience which happened to include military service.

It is also quite within the realm of possibility that McCubbin was not written to at all by Harris, that he did not call again at the British Consulate, and therefore, was not referred by anyone at the British Consulate to the British Friendly Association, and that he learned of the existence and location of the British Friendly Assocation in the most casual manner. If such were the means which led McCubbin to the British Friendly Association, certainly there will be nothing to connect the activities of that association in any way with his previous offer to volunteer for service in the British army, and again, it could not be claimed that the plaintiffs in error had "hired or retained" McCubbin to go out of the country with intent to be enlisted or entered in the service of the British army as a soldier.

But let us now assume that paragraph 19 of the agreed statement of facts (Trans. p. 103) means that Harris caused correspondence and communication to be opened with every party named on the register, and that therefore McCubbin was communicated to with the rest. It is only an inference that such a letter was addressed to McCubbin at the British Consulate; but let us assume that the letter was so addressed.

There is nothing in the record before the court to show that McCubbin knew that his name was entered on a register in the office of the British Consulate under a heading which classified him as one who had volunteered to serve in the British army; and in fact McCubbin's name was entered under the heading of "Volunteers", and there was nothing to indicate that he volunteered for service in the army as distinct from service in the navy. He was not classified under the heading of "Army Volunteers" or under the head of "Army Volunteers and Ex-Soldiers"; and it is, therefore, only an inference that he volunteered at all, or that he volunteered for service in the army, because, forsooth, he stated that his previous service had been in the Prince of Wales' Light Horse (L. H.). Therefore, even if the receipt of a letter from Harris addressed to McCubbin at the British Consulate suggested to him that his name had been furnished Harris by the British Consulate, there was nothing in this circumstance to suggest to him the further thought that Harris knew of any previous offer on his part to volunteer for service in the British army. If McCubbin had known that he had been listed in the office of the British Consulate as a volunteer for service in the British army, such a thought might have occurred to him, but there is nothing to show that he knew he had been so listed. But let us assume that a letter was sent to McCubbin in care of the British Consulate and that, upon its receipt there, he might have suspected that Harris knew of his previous offer to volunteer for service in the British army, still there was nothing in the circumstance to

suggest to McCubbin that any relationship existed between the British Consulate and the British Friendly Association, or that the British Consulate had done other than furnish the British Friendly Association his name, without necessarily furnishing any statement that he had previously offered to volunteer for service in the British army. McCubbin did not know that the funds of the British Friendly Association were furnished by the British Government. He did know that the office of one was separate from the office of the other. The very name, "British Friendly Association", would normally suggest to his mind that the funds at the disposal of that association were contributed as the result of British benevolence, just like the funds of the British Benevolent Society, with which institution, as a British subject, he was doubtless familiar. The very fact that the British Consulate advised him that they could no nothing would serve to emphasize this idea in his mind. Therefore, it is not probable that McCubbin would assume that Harris knew anything about his previous offer to volunteer for service, and certainly it is far fetched to urge that plaintiffs in error were bound to presume that McCubbin would approach them with such an assumption on his part.

But, nevertheless, we will assume that McCubbin approached the British Friendly Association with the thought that his name had been suggested to it by the British Consulate and with the suspicion that they were advised of his previous offer to volunteer for service in the British army. But here again no direct question is asked at the British Friendly Association

about his military service, and that fact is only incidentally disclosed to the plaintiffs in error. His answers may well have been, "I am at present unemployed. For years I have been a clerk and an accountant. I was at one time an officer in the Prince of Wales' Light Horse". The request to submit to a physical examination could have no more effect on the case in the circumstances now assumed than in those heretofore considered. Certainly, if McCubbin suspected that the plaintiffs in error knew of his previous offer to volunteer for service, he must have thought, from their silence, that they were singularly indifferent about it. But while the plaintiffs in error, as a matter of fact, with the register before them, would know that McCubbin had been listed by the Consulate as a volunteer for something, their deliberate failure to refer to it, calculated, as it was, to disarm any suspicion in McCubbin's mind that they knew anything of his offer of service, leaves their course of conduct, one directed to avoid rather than to raise any tacit promise in McCubbin; and a contract of "hiring or retaining" cannot be predicated upon sentiments in fact entertained by McCubbin unless they were deliberately aroused by the plaintiffs in error, and their aid and assistance was furnished in reliance upon the effect of such sentiments as they were confident had been aroused. In other words, if the plaintiffs in error had offered to aid McCubbin to return to England and in doing so made it apparent to him that their motive sprang from their knowledge of his willingness to enlist in the British army as a soldier, a case of "hiring and retaining" might be established, but such a case fails when

the effort is to conceal from McCubbin any knowledge of his intentions or purposes on the subject of enlistment and to deal with him as though he neither had nor ever expressed any readiness to serve as a soldier. Therefore, unless there was something in the letter sent by Harris to McCubbin which would serve to raise such a tacit contract, none can be asserted. The letterhead used by Harris (Exhibit D, Trans. p. 116), was barren enough in suggestion.

What was in this letter, if one was sent at all? The record does not show. Of course, if this letter read, "The writer is advised that, if returned to England, you will enlist in the British army as a soldier; if still of this purpose, call at the office of the British Friendly Association and transportation to New York will be arranged for you", or to a similar purport, the acceptance of assistance by McCubbin following the receipt of this letter might raise a contract of "hiring or retaining". But the instructions which Harris received from the British Consul-General when this register of names was turned over to him were not only "to make no solicitation" (Trans. p. 103), but also "to make no engagements of any description whatever" (Trans. p. 102). Therefore, to assume that Harris wrote such a type of letter as is above referred to requires an assumption in addition that he deliberately violated his instruction. Suppose, on the other hand, the letter read, "Your name has been sent to us, as one desirous of returning to Great Britain. If you will fill out the enclosed card and mail to us, we will, if your credentials are satisfactory, endeavor to arrange for your transportation

as far as New York." Suppose the card referred to as enclosed was one of the cards which were printed for the British Friendly Association and was in the following form (Trans. p. 104):

"Name....., No.....
Address....., Age.....
Birthplace.....
Present occupation.....
Previous occupation and experience at home or elsewhere.....
Have you any family here?..... "

Suppose that this was the sort of communication which McCubbin received,—and it is clear that such a communication would not suggest to him that the furnishing of transportation to him was dependent upon an agreement on his part to go out of the country with an intent to enlist as a soldier in the British army. The statement that his name had been sent to the writer would not necessarily suggest that it was the British Consulate which had sent his name; for McCubbin did not know what the relations between the British Friendly Association and the British Consulate were. But, even assuming that he suspected that it was the British Consulate who submitted his name, there would be nothing in the letter which would suggest to him that the British Consulate had communicated to the writer of the letter any information to the effect that he had volunteered to serve in the British army. If the idea occurred to McCubbin that such a statement might have been made to the writer of such a letter he would naturally dismiss such a thought when he found no reference to it in the letter. The reference in such a letter

to his credentials being satisfactory, would naturally suggest to him that he would be obliged to make satisfactory proof that he was a British subject. And there would be nothing on the card which amounted to asking any direct question as to previous military service. It is true that incidentally, of course, in filling out such a card, if a man had had previous military service, that fact would appear on the card. Thus, in this indirect way, the plaintiffs in error would learn whether the party concerned had previous military experience or not, without putting to him a direct question to that effect, and without thereby suggesting to him any implied condition connected with the assistance they were about to furnish. In this connection it must be recalled, too, that with the sufficient information which the register gave to the plaintiffs in error as to the military services of those there listed, further direct questions as to military service would be unnecessary. Therefore, if a letter were written to McCubbin at all, and if it were of the character just described, there was nothing in the letter to indicate to McCubbin any implied obligation on his part to go out of the country with intent to be enlisted in the British army as a soldier in consideration for the assistance received.

And what is true of McCubbin is likewise true of Robert Watson, if the Robert Watson appearing on the register was the Robert Johnson mentioned in the indictment (Trans. p. 110, Par. 48). Furthermore, in the case of Watson, if Watson be Johnson, the inference with regard to him would be, that if he went with intent to be enlisted at all, it was his purpose to be

enlisted as a seaman, he having, so far as the record is concerned, no military experience whatever, but having had experience as a sailor in both the British and American navies. What is there in the record to show that Johnson (alias Watson) was persuaded to forsake the service with which he was familiar to enter the British army as a soldier, a service with which he had had no experience?

These remarks dispose of the only two cases of men whose names appeared on this register, which the record before the court in any way connects up with the activities of the plaintiffs in error. They also apply to the cases of any of the unnamed 115 men whose names may have been secured from this register.

So far as men are concerned whose names were not on the register, to whom no letters were sent (because there is no showing of a correspondence except with those listed on the register), they would occupy the precise situation of McCubbin, if no letter had been sent to him, and their case has, therefore, already been discussed, except that having at no time to the knowledge of the plaintiffs in error volunteered for services, their intentions to enlist, if they entertained such, could not be known to the plaintiffs in error, nor could the men by any possibility suspect that they were.

Now, then, let us pause for a moment and consider out of what a mass of assumption the prosecution must construct its conclusion that the plaintiffs in error "hired or retained" men to go beyond the limits or jurisdiction of the United States with intent to be

enlisted or entered in the service of the King of Great Britain and Ireland as soldiers.

In the case of men whose names appear on the register, if the use of that register is to have any significance, to a conviction of guilt, the following assumptions are necessary:

1. That the men addressed by Harris or referred to Blair by the Consulate knew that they had been listed at the Consulate as volunteers for service in the army, and knew of the relations between the plaintiffs in error and the Consulate.

2. That the letters written them referred to the fact that the party addressed had already volunteered for service in the army, or was of such a character as to suggest that the writer knew of the fact of volunteering.

3. That the knowledge that the party addressed had volunteered for service in the army, whether referred to directly or only suggested, was incorporated in the letter in such fashion as to make it plain that the offer of assistance and transportation to New York was conditional upon an express or tacit promise to go out of the United States with intent to be enlisted in the British army as a soldier.

4. That no letter could be written these men which would avoid raising such a tacit promise on their part.

The first of these assumptions has no basis whatever. The other three are more than outweighed by making a more likely assumption, more consistent with the other facts and with the presumption of innocence, that the letter was of the second type heretofore suggested.

And in the case of all the men transported, whether their names were on the register and they were written to, or not, to a conviction of guilt, the following further assumptions are necessary:

1. That the men transported knew of the relations between the plaintiffs in error and the Consulate;

2. That the men were asked directly whether they had had any military service;

3. That the men knew that the record made out only recorded a man's military service;

4. That the fact that the man was obliged to submit to a physical examination made it so clear to him that in consideration of the assistance to be furnished by the plaintiffs in error he was bound to leave the country for the purpose of enlisting in the British army as a soldier, that the plaintiffs in error could rely on his doing so without securing any direct promise from him to that effect, because this circumstance raised a tacit promise in him.

5. That the intention of the transported men to enlist was not only known to the plaintiffs in error, but that the transported men knew it was known, and knew also that, were it not for such an intention on their part, no aid or transportation to New York would be furnished them.

The first three assumptions rest on no established fact. The fourth is far-fetched, and for the sake of establishing guilt has to imply that men are only too eager to imagine themselves committed to obligations which have not been suggested. The last proceeds on

the theory that "supposition, belief and presumption" are the equivalent of "knowledge", and is without any basis whatever in fact. Not one of the foregoing assumptions is the result of a fair and reasonable inference from anything in the agreed statement of facts. They are on the contrary assumptions merely, dragged in by the heels.

The foregoing assumptions, or others like them, must be indulged, we submit, if the theory of this prosecution is to be sustained; but that conjecture cannot be heaped upon conjecture, or inference piled upon inference, is settled by the highest authority. In speaking of a similar indulgence in assumptions, the Supreme Court took occasion to say:

> "These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed as the very foundation of indirect evidence is
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> "Starkie on Ev., p. 80, lays down the rule thus: 'In the first place, the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue'. It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open visible connection between the principal and evidentiary facts and the deductions from

them, and does not permit a decision to be made on remote inferences."

U. S. v. Ross, 92 U. S. 281;
First National Bank v. Jewett, 114 id. 224;
Vernon v. U. S., 146 Fed. 125.

And as against these assumptions of the prosecution, is the silence of the record, and the even more plausible and more consistent presumptions which may be made in favor of the innocence of the plaintiffs in error. The record shows no express promise which would establish a contract of "hiring or retaining"; it shows no facts which, without the assistance of inferences to be drawn, constitute such circumstances as raise a tacit obligation necessary to a contract of "hiring and retaining", in the absence of any express promise. And to build up the circumstances to a point where such a tacit obligation may be established, it is necessary to prejudge the guilt of the plaintiffs in error, and then draw inferences consistent with guilt, and discard all equally or more plausible inferences consistent with innocence.

For instance, in view of Harris' instructions from the Consulate, it is more plausible to assume that he wrote the second type of letter which we have suggested than the first. In view of the form of the record cards, it is more likely that no direct question as to military service was asked, for if the plaintiffs in error are entitled to any presumption of innocence, they are equally entitled to the presumption that they were trying to obey the law and avoid making contracts of "hiring or retaining", and by asking a general question they were just as sure to learn of any military service as from the

more direct question, and less likely to raise any tacit obligation in the men assisted and transported.

Now, under the settled doctrine of the national courts, the circumstances must be of such a character as to exclude every reasonable hypothesis except that of guilt, and where the circumstances are as compatible with innocence as with guilt there arises the reasonable doubt that requires an acquittal.

U. S. v. Hart, 78 Fed. 868; affirmed 84 Fed. 799;
U. S. v. Richard, 149 Fed. 443;
Union Pac. Coal Co. v. U. S., 173 Fed. 737, 740;
Tucker v. U. S., 224 Fed. 833.

In this connection let us now look at the course of conduct of the plaintiffs in error as a whole. They were enjoined to make no solicitation, and to make no engagements of any description whatever. They organized and operated under the name of the British Friendly Association and at no time had their offices associated with those of the British Consulate. We have shown that it was quite possible for them to communicate with the men whose names were on the register furnished by the British Consulate without being guilty of solicitation or of making engagements of any description whatever. If the cards which they had prepared for their use were enclosed in these letters, as has been suggested they might be, they were calculated to give the plaintiffs in error information as to the previous military service of the party concerned, without asking him that direct question, because under the general question of "previous occupation", "previous experience at home or elsewhere", military service would be returned if

such service had been had. But in the case of men whose names appeared upon the register, it was not necessary to ask them anything about their previous military service, because that information was on the register itself. Therefore, there is nothing to point the conclusion that in the case of men whose names appeared upon the register the plaintiffs in error ever asked the direct question about previous military service. In the case of men reporting at the offices of the British Friendly Association, whether directed there by the British Consulate, by friends, or by chance, the cards containing the names and previous occupation were made out "for (and not by) each of said men" (Trans. p. 106, Par. 33). Looking at these cards as they are set forth in Exhibit F (Trans. pp. 120-128), the previous service recorded only includes military service. The explanation for this, however, is simple. In asking a man about his previous occupation, the military service, if any, would naturally come out. This was the only feature of the man's previous occupation in which the plaintiffs in error were actually interested, as they were instructed "to send only British subjects who had military training" (Trans. p. 102, Par. 108). Therefore, in making out these cards for these men, the only item of previous occupation which would be recorded was that relating to the one feature of previous occupation in which they were interested, namely, the military service. If no military service were shown, the man would be rejected, and so far as he was concerned, the case would be ended. If military service were shown, the man would be accepted, provided he passed a

physical examination, but there was nothing in the record to show that the man himself knew that it was this item of previous military service which gave him his opportunity for transportation.

The agreed statement of facts, among other things, contains the following statement: "That an unknown person at certain times stood near the entrance at 68 Fremont Street, in the City and County of San Francisco, and instructed applicants as to the necessary requirements before they could be transported; but it is admitted that if Blair and Addis took the stand and testified herein under oath, they would testify that the same was done without their knowledge or authority" (Trans. p. 107, Par. 38). This is equivalent to a statement that by the uncontradicted testimony of the plaintiffs in error they had no knowledge that such instructions were being given, and that the same were not given with their authority. Therefore, if any applicant approached the plaintiffs in error who had been advised that he must establish previous military service as a condition to receiving transportation, the plaintiffs in error were not aware that such instructions had been given and were not aware of the frame of mind in which the applicants approached them who may have been so instructed. It takes two parties to make a contract, and, therefore, the frame of mind of any such applicant is not sufficient to raise a tacit contract of "hiring or retaining", in his case, because the circumstance, that such an applicant believed it was necessary to show military service as a condition to receiving transportation was not known by the plaintiffs in error.

In framing their questions as to previous occupation in a general form, in maintaining a separate establishment, in using a letter-head bearing simply the name and address of the British Friendly Association, in framing their communications, every effort was made, so far as persons whose names may have appeared on the register are concerned, to disassociate in the minds of those persons the British Friendly Association from any service which they may have volunteered. With reference to all, in framing their questions as to previous occupation in general form, and so learning of military service without emphasizing it, in avoiding all references to enlistment, it is evident that the plaintiffs in error were trying to furnish aid and transportation to New York under such circumstances as would not raise any tacit obligation, as they had avoided receiving any express obligation, from the men to go out of the country with intent to be enlisted in foreign service, as a condition of receiving such assistance. This was done, not for the purpose of evading the laws of the United States, but was done for the purpose of avoiding the doing of those things which the laws of the United States had prohibited. A law cannot be evaded, though punishment may. A law is either violated or observed. There is no *via media*. And in rendering assistance to the men transported to New York, the plaintiffs in error not only avoided directly putting them under any obligation whatsoever, but went further, and tried to so shape their conduct as to avoid imposing upon the transported men any implied obligation whatsoever.

There is absolutely nothing in the record before this court which establishes directly or inferentially that the plaintiffs in error "hired or retained" any person to go beyond the limits or jurisdiction of the United States with an intent to be enlisted in the service of the King of Great Britain and Ireland as soldiers.

But the learned judge of the court below placed some stress upon the consular instructions recited in paragraph 18 of the agreed statement of facts; and be it said with every possible respect, approached and considered those instructions in the frame of mind complained of by us in the 12th and 30th assignments of error. As far back as March 18, 1915, which was the date when the British Friendly Association opened its office at 21 Pine Street (Par. 11); the instructions in question were issued by the Consul-General; and it would, in our opinion, be unreasonable to contend that these instructions were framed and issued for the purpose of violating Section 10. Moreover, no claim is made, in any paragraph of this agreed statement of facts, that these instructions were, in any particular, ever departed from by Harris, Blair or Addis. The first of these instructions was: "To send only British subjects who had military training"; but what paragraph of the agreed statement of facts exhibits any violation of this instruction? True, Cook was an American citizen who had never been in the military service of Great Britain; but Cook deliberately deceived and misled those whom he came into contact with; he falsified to Blair and Addis in San Francisco; and he falsified to the investigating special agents of the United States,

who interviewed the Croft party at Chicago, and were satisfied to pass that party on its way to New York (Pars. 46, 41). Stables *was* a British subject, but was an enlisted man in the American army; he, too, deceived and misled Blair and Addis. He concealed from them his American enlistment; and that fact was wholly unknown to them (Par. 47). Robert Johnson was a British subject; he was actually a deserter from the British navy; and he was "*formerly*" an enlisted man in the American navy under an alias,—but when that was, how long "formerly", whether one year or ten, this agreed statement of facts, upon which the prosecution asks to have the presumption of innocence displaced by evidence which sustains the burden of proof beyond a reasonable doubt, nowhere vouchsafes any answer (Par. 48). These falsifiers and this antiquated deserter aside, what departure from this instruction, made with malice prepense, does this agreed statement of facts exhibit? How can any such departure be claimed in view of the facts and the declaration made in paragraph 49, which concedes, so far as known, the British nationality of all other parties?

The second of these instructions directs Harris "to make no engagements of any description whatever". In commenting upon this, the learned judge of the court below remarks:

> "It is not stated in the instructions what they were to do in this regard, but they were to examine the men to see if they were suitable, and to send them on, not more than fifty at a time. Evidently, while under the instructions, they could make no engagements, they certainly could come to some understanding with the men

> that they should be sent forward for some purpose for which, after a physical examination, they were found to be 'suitable' " (Record p. 149).

But why should it be "stated in the instructions what they were to do in this regard"? This calmly assumes, in the face of the instruction, that there was something that "they were to do in this regard"; whereas, the instruction is emphatically negative in character. There was nothing that "they were to do in this regard"; they were "to make no engagements of any description whatever". If there was anything that "they were to do in this regard", why was it "not stated in the instruction"? Plainly, nothing was "stated in the instructions what they were to do in this regard", because there was nothing "that they were to do in this regard",—if anything of that kind existed, it would have been included within the agreed statement of facts. The learned judge himself concedes that "evidently * * * under the instructions they could make no engagements", but seems to think that they could come to some "understanding" with the men,—a passage which we read to mean that "evidently while under the instructions they could make no engagements", yet they could make engagements with the men, because an "understanding" with these men that is not an "engagement" with these men is no "understanding" whatever. And if by this uncertain term "understanding", the learned judge means to suggest some sort of arrangement falling short of the binding force of an "engagement"—some arrangement which does not "engage" the men,—then what becomes of the

claim of the learned judge that "it would be taxing credulity to the utmost to urge that with the lists and instructions, the defendants did not know that what was sought by the Consul-General was men who would go to England, there to enlist in the military or naval service"? It would certainly be taxing credulity, we submit, to suppose that these men would go to England, there to enlist in the military or naval service, upon some vague, uncertain and attenuated "understanding" which did not amount to an "engagement". As a learned federal judge puts it, the hiring and retaining of a person here to go abroad to enlist in a foreign military service requires not only the intent, but also the assent of the person hired or retained, and "it is an *engaging* of one party by the other, with the consent and understanding of both" (*U. S. v. Kazinski,* supra). But the learned judge below overlooks the fact that the consular instruction was not that "they could make no engagements". Such was not the instruction; that instruction was "to make no engagements of any description whatever"; but is an "understanding", an "engagement" of any description whatever? According to any reasonable view, an "understanding" would be useless if it did not amount to an engaging of the men. If this "understanding" did not amount to an engagment of the men, then there was no hiring or retaining within the definition given in the *Kazinski* case; but if this "understanding" did amount to an engagement of the men, then it was prohibited by the very instruction under which the learned judge concedes that "they could make no engagements".

But, in addition to all this, what paragraph of this agreed statement of facts exhibits any departure from this instruction? With what man was any "engagement of any description whatever" entered into? Does this agreed statement of facts carry us any farther in that direction than a supposition, belief or presumption upon the one side, an uncommunicated "individual" intent upon the other side, and an absence of speech upon the subject-matter involved upon both sides (Pars. 45, 55)?

The third of these instructions was that they were "to give no pay or advance"; and the learned judge of the court below remarks upon this that "it is not stated 'pay or advance' for what". But the instruction was to give no pay or advance; it was what logicians would describe as a universal negative proposition; it contains no qualification or exception; and it prohibits all "pay or advance". If we assume that the expression, "pay or advance", presupposes some "engagement" for, or in respect of which the pay is to be given or advance made, then it is clear that this instruction should be read with that preceding it, whereby all engagements of any description whatever are prohibited; and this, we submit, is the point of view from which these two instructions are to be regarded. The evident effect of the instructions was to avoid any infraction of the municipal law of the United States; that was the object of issuing these instructions; and the prohibition against engagements and against pay or advances was designed to safeguard this purpose. Nor does the agreed statement of facts exhibit any departure from

this instruction; no pay or advance was given to any of these men; all that they ever got was sustenance money and transportation, and so far as the sustenance money en route to New York City was concerned, that was given, not to the men at all, but in bulk to Croft, who gave it out in limited amounts as the party proceeded upon its journey (Par. 40).

The fourth of these instructions was "to make no solicitation"; but upon this the learned judge of the court below has no comment to make. And yet, the theory of the prosecution, from the indictment onwards, was that about March 15, 1915, this conspiracy was formed; that it was a continuous conspiracy, and that its purpose was to violate Section 10 by hiring and retaining men here to go abroad for foreign military service. It appears from Paragraph 39 that the men referred to in the indictment left San Francisco for New York City on June 16, 1915. Consequently, this continuous conspiracy had been in operation for three months on June 16th. Is not this matter of solicitation, then, an important one in a cause in which this very conspiracy is denied and repudiated? If this continuous conspiracy really existed, with the purpose ascribed to it, is it not a matter of very genuine surprise, that from the beginning to the end of this history, no whisper of solicitation has come to our ears? And if there had been any solicitation of men for this foreign enlistment, can the avidity with which that fact would be seized as conclusive of the conspiracy, be doubted? In an enterprise of the character referred to in this indictment, one would be well warranted in

regarding solicitation as an indispensible activity, in regarding its presence as highly suggestive of an organized purpose, and in regarding its absence as practically conclusive of the absence of such organized purpose; and yet, upon this significant feature of the case, the learned judge below had no comment to make, notwithstanding that his views as to how the operation of a conspiracy whose purpose was to hire and retain men for foreign enlistment could be carried on without solicitation, would not have been without interest. And what paragraph in the agreed statement of facts disclosed any violation of this instruction? What man was "solicited"? When, where, by whom, for what purpose, under what circumstances was any solicitation carried on by any member of this so-called conspiracy during the three months that intervened between March 15th and June 16, 1915,—a period when no claim is made that any obstacle existed to prevent any such solicitation?

The fifth, sixth and eighth instructions need not detain us long. They are evidently not directions of a criminal character, especially when read in the light of the evident object of the instructions as a whole. If British subjects should desire to return home, and if there be no criminality in assisting them to do so, surely no criminality can reasonably be extracted from a regulation restricting the number sent at any one time, or a direction to verify their claim of British nationality, or an instruction designed to prevent the return of physical inefficients, or cripples, to a country already taxed by the burden of a mighty conflict.

Finally, the seventh instruction provides that "they were to give no information as to pay, allotments, etc." Does this indicate that desire to violate Section 10, which is imputed by the indictment? Is not this instruction in line with the prohibition against making engagements of any description, against giving pay or advance, against solicitation? What sort of outlook, what manner of mental attitude prompted such instructions as these? Approaching them in the true spirit of the criminal law, approaching them with minds ready and willing to adopt the view which makes for innocence rather than for guilt, do these instructions indicate a purpose to violate the law, or the reverse? Are they not all so many exponents of a fixed purpose not to violate the law? And what departure from this seventh instruction has ever occurred? To whom was any information given as to pay or allotments? In this particular as in others, what paragraph of the agreed statement of facts can be pointed to as showing any violation by these plaintiffs in error of these consular instructions?

But, moreover, another thought is suggested by the inquiries of the learned judge of the court below, who, on page 149 of the record, exhibits a questioning attitude; and this provokes the inqury as to what manner of showing in a criminal cause, that is, which leads the learned judge, upon material matters, to grope about in perplexed uncertainty? When the rule requires a showing so clear and explicit that the strong presumption of innocence becomes overturned by evidence that removes all reasonable doubt, why should the learned judge be found making inquiries, seeking light,

getting none, and unwittingly complaining of the obscurities and shortcomings of the agreed statement of facts? Are these deficiencies to be supplied by "an indulgence in surmises, speculations and conjectures not countenanced in criminal law?" *(People v. Porter,* 104 Cal. 415, 417.) Is it to be forgotten that "agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts? (*Pomeroy's Lessee v. Bank of Indiana,* 68 U. S. (1 Wall.) 592.) In other words, we respectfully urge that the incurable indefiniteness of the agreed statement of facts upon the subject-matter of conspiracy and upon that of hiring and retaining, furnishes a valid argument against the existence of either.

Neither a conspiracy nor a criminal agreement of hiring or retaining can, upon elementary principles of the criminal law, be founded upon ambiguous or uncertain statements; neither doubt nor conjecture has yet been made the basis of a criminal conviction; and in order to sustain such a conviction, the record must be so clear and explicit as to leave no room for reasonable controversy. No one can read the indictment, or even the agreed statement of facts, without realizing that their scrivener understood fully what was necessary to constitute both a conspiracy and a hiring and retaining; but the statements actually made are entirely too vague, indefinite and dubious to justify a finding of either; and this very imperfection and uncertainty, upon matters which should have been distinctly and clearly stated if the truth justified them, is, we think, pointedly

indicative of the non-existence of the alleged conspiracy and the alleged hiring or retaining. The very uncertainty and obscurity as to these two elements negative their existence. If uncertainty as to either should exist —as we think it does exist—it certainly would not be the province of the courts to engraft either upon the obscure record before us; this very uncertainty becomes a reason for holding, in this criminal cause, that neither element exists; and the absence of clear and explicit statement creates an uncertainty, which is in itself cogent evidence of the non-existence of the foundation of this conviction. The fact that in the various paragraphs of this agreed statement of facts so much is left uncertain and dependent upon surmise, speculation and conjecture, naturally leads the mind to the conclusion that there was no conspiracy and no hiring or retaining; and this process of reasoning refuses to convert by a process purely argumentative, a series of obscure declarations into a finding of conspiracy or hiring or retaining where, from the very vagueness of the declarations, it is apparent that no conspiracy existed and that no hiring or retaining was attempted. This line of reasoning appeals to the obscurity of the agreed statement of facts to show that no conspiracy existed and that no hiring or retaining was attempted; and, we believe, that there is nothing in sound reasoning, nothing in the decided cases, to preclude a resort to the very obscurity of such a record as this as a very convincing reason for holding with these plaintiffs in error. No conviction, we respectfully insist, can be sustained which is based upon doubtful or uncertain terms; and in cases of reasonable doubt arising from such terms,

the law uniformly favors the defendant. No such process is recognized in criminal jurisprudence as that of indulging an argumentative conclusion from ambiguous or obscure expressions. On the contrary, before a conviction will be permitted to stand, the showing of fact must be so explicit and free from uncertainty and obscurity that no reasonable doubt can be entertained concerning the alleged facts upon which said conviction purports to be based.

Nor could any better illustration of this be suggested than the conditon of this record upon this subject-matter of the hiring or retaining of the men referred to in the indictment. Nowhere throughout this agreed statement of facts is it anywhere stated as a fact that any agreement was entered into by anybody with any one of these men, whereby he was hired or retained here to go abroad to enlist in foreign military service. If any such agreement ever was made, it would have been accorded a prominent place in the agreed statement of facts. If any such agreement ever had any such existence, its terms would have been stated; but nothing of the kind was done, because no attempt was ever made to enter into any such agreement,—because the consular instructions were recognized and obeyed. How, indeed, could there have been any agreement of hiring or retaining where no terms of any such agreement, definite or indefinite, anywhere appear?

The learned judge of the court below, in the course of his charge to the jury, gave the following definition of the word hire:

> "To hire in its ordinary signification, and we should here seek no other, means 'to contract for the labor and services of, for a compensation, to engage the services of, employ for wages, salary or other consideration; to engage the interest of, agree to pay for the desired action or conduct of', and this has been the meaning of the words since it was first used in the statute in question and its predecessors" (Trans. p. 145).

Could any definition more emphatically accent the thought, not only of the necessity of an actual meeting of minds, but also of an actual meeting of minds upon definite elements? What more significant than the recurrence of such assimilated terms as "contract", "engage", "employ" and "agree"? What more pointed than the reference to "labor and services", "services", "interest" and "desired action or conduct"? What more suggestive than the inclusion of "compensation", "wages, salary or other consideration", and "pay"? Are the ingredients here indicated to be established, beyond all reasonable doubt, by suppositions, beliefs, presumptions, or uncommunicated "individual intents" (Par. 45)? Are the ingredients here formulated to arise from the absence of speech between the parties interested (Par. 55)? The fact is that the rules upon this topic are plain. In a hiring there must be a definite offer and an equally definite acceptance; otherwise, none of these ingredients mentioned by the learned judge of the court below can be found in the relations between the parties. Not only are a definite proposal and an equally definite acceptance necessary to the agreement of hiring, but the mutual assent of the parties to the terms of the agreement must be equally definite; and there is no agreement so

long as any essential element is incomplete or open to negotiation.

Anson, Contracts, pp. 17 et seq.;
Pollock, Contracts, pp. 38-9;
Parsons, Contracts, 9th Ed., star, pp. 476-7;
Walton v. Mather, 37 N. Y. S. 26; 38 id.;
Petze v. Morse Dry Dock Co., 109 N. Y. S. 328; affirmed 89 N. E. 1110;
Shaw v. Woodbury Glass Works, 18 Atl. N. J. 696; 24 id. 1004;
U. S. Coal Co. v. Pinkerton, 169 Fed. 536.

It is often said that the interchange of reciprocal promises is a sufficient consideration to support a contract; and in ordinary cases of executed contracts, it is true that a promise on one side to serve, plus a promise upon the other side to pay, may suffice. But where no performance has as yet taken place, where the agreement is as yet executory, and where there is merely a promise for a promise, there must be a valid and binding promise by the party hired, supported by a sufficient consideration. Otherwise, the engagement is all one one side, and falls because *nudum pactum (Russell v. Slade,* 12 Conn. 455). But this does not mean that the agreement need not bind both; on the contrary, it must bind both; if it leave either party free to depart at any time, it is not a binding hiring (*Learner v. Tetrazzini,* 129 N. Y. S. 889, 1132; *Bustonaby v. Revardel,* 130 id. 894; *Louisville, etc. Ry. v. Offutt,* 59 A. S. R. 467; *Howard v. East Tenn. Co.,* 8 So. (Ala.) 869). There is no mutuality where one of the parties cannot be compelled to perform the promise which is

the alleged consideration for the promise of the other party. A contract under which either party may put an end to the relation at any moment, is not binding, unless supported by an independent consideration; and where a promise is met by assent or acquiescence only, but not with any promise to perform or to do anything which creates an obligation on the assenting party, there is no mutuality.

Sykes v. Dixon, 9 Ad. & Ellis 693;
Wilkinson v. Heavenrich, 55 A. R. 708;
Crawford v. Parons, 18 N. H. 293;
Bowman Dairy Co. v. Mooney, 41 Mo. App. 665, 675;
Price v. Western L. & S. Co., 100 Pac. (Utah) 677;
1 Labatt, Master and Servant, Sec. 89, p. 328; Sec. 91;
Vogel v. Pekoc, 30 L. R. A. 491; 157 Ill. 339;
St. Louis, etc. Ry. v. Matthews, 39 L. R. A. 467;
Bolles v. Sachs, 33 N. W. (Minn.) 862;
Spatz v. Singer, 116 N. Y. S. 576;
Keith v. Kellerman, 169 Fed. 196.

But in what paragraph of the agreed statement of facts can we find any promise by the plaintiffs in error, or either of them, to any one of these men, or by any one of these men to the plaintiffs in error, or either of them? What is there here to furnish any basis for compulsion to keep any promise? Assuming a relation of some sort among these parties, what fact is disclosed in this agreed statement which would prevent either party from putting an end to that relation at any mo-

ment? And assuming, again, a state of facts not agreed to by the parties, assuming a promise upon one side met by assent or acquiescence upon the other, where is there any promise by any one of these men to perform anything, or to do anything which would create any obligation upon any one of them?

We respectfully submit that, regardless of the statute of frauds, no agreement of hiring will be judicially recognized as having a valid existence where:

1. The date when the service is to begin is not specified, but is left uncertain and indefinite.

2. Where the duration of the service is not fixed.

3. Where the character of the work to be performed by the person said to have been hired, is not indicated with reasonable precision.

4. Where the amount of remuneration to be paid is not fixed.

Faulkner v. Des Moines Drug Co., 90 N. W. (Iowa) 585;
McIntosh v. Miner, 55 N. Y. S. 1074;
Davie v. Lumbermans' Mfg. Co., 24 L. R. A. 357;
Howard v. East Tenn. Co., 8 So. (Ala.) 868;
East Line Ry. v. Scott, 13 A. S. R. 758;
Price v. Western L. & S. Co., 100 Pac. (Utah) 677;
Wall's Appeal, 56 A. R. 288;
Ogden v. Philadelphia Tract Co., 52 Atl. (Pa.) 9;
Parsons v. Trask, 66 A. D. 502;
Williams v. State, 64 S. E. (Ga.) 492;
Bleumner v. Garvin, 104 N. Y. S. 1009;

W. J. Oliver Const. Co. v. Reeder, 66 S. E. (Ga.) 955;

Petze v. Morse, etc. Co., 109 N. Y. S. 328; 89 N. E. 1110.

But none of these features appear anywhere in the agreed statement of facts. Neither the beginning nor the end of the alleged service is anywhere fixed; nor is there the faintest whisper as to the character of the work to be performed by these men, save and except the vague and indefinite guess to be predicated upon the equally vague and indefinite term "soldiers"—we cannot even guess whether they were to be employed as infantrymen, cavalrymen, artillerymen, or what. A feeble reference to the compensation of British soldiers is contained in Paragraph 44; we are there told what all the world knows—that British soldiers receive a daily pay; and we are further told that they "*may*" receive pensions and allotments after the service is terminated; but, as if to accentuate the delightful indefiniteness of all this, we are also told that nobody concerned knew what the rate of daily pay was, and that nobody concerned knew whether that rate had been increased. Surely, any man who would enter into an agreement, under these conditions, to go abroad for foreign enlistment, would require a very vigorous and energetic guardian.

And this same lack of coherence, this same indefiniteness, this same failure to assemble with clearness sufficient facts to support this indictment, runs all through the case. Bearing in mind the supposition, belief and presumption referred to in Paragraph 45, bearing in

mind the uncommunicated "individual" intent of the "majority" (was it one more than half or one less than all?) of the men (Par. 45), bearing in mind the absence of speech between the parties interested (Par. 55), and bearing in mind that, as observed by Mr. Justice Gray, "a contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both" *(Holder v. Aultman, Miller & Co.,* 169 U. S. 81, 89), what, we ask, would be the judicial fate of one who sued as master to recover damages for an alleged breach of an alleged contract of hire, committed by the person hired, and, when called upon to establish the alleged contract of hiring, was compelled to admit that no words upon the subject ever passed between the parties, and that he only supposed, believed and presumed that there was such a contract?

> "A contract", it is said, "is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract."
>
> *American Can Co. v. Agricultural Ins. Co.,* 12 Cal. App. 133, 137;

but how, then, can it be reasonably contended that supposition, belief, presumption, uncertainty, doubt, or any other subjunctive mood is compatible with agreement? There is but one reply to this question:

Anson, Contracts, 2;
Smith v. Faulkner, 12 Gray 251;
Havens v. Am. F. I. Co., 39 N. E. (Ind.) 40;
Wills v. Carpenter, 25 Atl. (Md.) 415;

Durgin v. Smith, 94 N. W. (Mich.) 1044;
Roofing Co. v. Adv. Co., 106 id. 274;
Lord v. Meader, 60 Atl. (N. H.) 434;
Jersey City v. Harrison, 62 id. (N. J.) 765; 65 id. 507;
Ice Co. v. Webster, 79 N. Y. S. 385;
Koenigsberg v. Blau, 127 id. 602;
Rankin v. Mitchen, 53 S. E. (N. C.) 854;
Phelan v. Neary, 117 N. W. (S. D.) 142;
McFarren v. Johnston, 6 Ont. 161;
Hoener v. Merner, 7 id. 629;
Carpenter v. Carpenter, 124 N. W. (Misc.) 488;
Radzinski v. Ahlswede, 185 Ill. App. 513;
Tucker v. Sheeran, 160 S. W. (Ky.) 176;
Trust Co. v. Granite Co., 79 S. E. (S. C.) 985.

But, in addition to this, not only was the "individual" intent of the "majority" referred to in Paragraph 45 never communicated to these plaintiffs in error, but it is also true, that "the minds of the parties never met as to the terms of any contract" (*Lord v. U. S.,* 217 U. S. 340, 348). When and where did their minds meet as to the date when the alleged service was to begin? When or where was there any meeting of minds as to the duration of the alleged service? What paragraph of this agreed statement of facts informs us as to any meeting of minds as to the character of the work to be performed? What paragraph discloses any meeting of minds as to the amount of remuneration to be paid? When and where did their minds meet upon the proposition that the men were to go beyond the limits of the United States with intent to enlist at all?

And yet, it is the law that the minds of the parties must meet as to all the terms; and if any of the terms are not fixed or settled, there is no agreement.

INTENT.

A conspiracy to violate a statute involves an intent to violate that statute; and unless that intent existed in the minds of the alleged conspirators, there can be no offense.

(a) *General Criminal Intent:*

It should be remembered, we venture to think, that a crime, whether of the grade of felony or of misdemeanor, is a resultant—a product; that it springs from the union of two elements; and that while one of these elements is objective—the act, the other is subjective—the mental condition or intent of the actor. Hence arises the well know maxim, *actus non facit reum, nisi mens sit rea,* which is a fundamental doctrine in the criminal jurisprudence, both of Great Britain and the United States, and which is supported by, and applied in, such a multitude and variety of adjudged cases that it would savor of pedantry to employ time and space in commenting upon them. The obligation which the law imposes upon an accuser, of establishing criminal intent beyond all reasonable doubt, should not, we think, be laid out of sight in appraising the agreed facts of the present cause; like the presumption of innocence, that obligation operates throughout the whole case; and, as observed by Mr. Justice Field,

> "the criminal intent essential to the commission of a public offense must exist when the act complained of is

> done; it cannot be imputed to a party from a subsequent independent transaction."
>
> *U. S. v. Fox,* 95 U. S. 670.

The Supreme Court having declared a conspiracy to be

> "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means",
>
> *Pettibone v. U. S.,* 148 U. S. 203,

it would seem plainly to follow that in order to establish a conspiracy under Section 37 of the Federal Penal Code, the following elements must be established by proof so convincing as to overcome the presumption of innocence and displace all reasonable doubt, viz:

1. An object to be accomplished, which object, in such a case as that at bar, must be the commission of an offense made such by a statute of the United States.

2. A plan or scheme embodying means to accomplish such object.

3. An agreement between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or any effectual means.

4. An overt act by one or more of the conspirators to effect the object of the conspiracy.

5. A criminal intent on the part of those claimed to be engaged in the conspiracy alleged.

6. In cases similar to that at bar, in addition to the general criminal intent, there must be, among the

alleged conspirators, the specific intent to commit against the United States the specific offense alleged in the indictment.

7. No intent entertained by or among the alleged conspirators must be contingent or conditional; such an intent will not support a judgment of conviction.

Before the judgment in the cause at bar can be supported, it must, therefore, be manifest from this agreed statement of facts, beyond all reasonable doubt, that there existed in the minds of the defendants below, to employ the language of the indictment, a "wilful, unlawful, wicked, corrupt and felonious" purpose to violate the law. The formation of a common design by two or more persons, or the participation in a common plan by two or more persons, is never of itself a criminal conspiracy; because this may be, and often is, perfectly innocent. Before such a confederation can be regarded as criminal, it must be entered into with a corrupt or criminal intent; and this requirement is recognized in the indictment in the present cause which, *inter alia,* alleges that the defendants did the acts charged, "wickedly, corruptly and feloniously". This material element of the crime of conspiracy can never be decided as a matter of law, but must always be decided by the jury as a matter of fact; and in cases where no criminal intent is found to have existed, there must be an acquittal. And as already pointed out, this essential element of the offense charged must be established, beyond all reasonable doubt, to have existed at the time alleged in the indictment, because no subsequent felonious intent (if any) will render the previous act or acts (if any)

criminal; criminal intent "cannot be imputed to a party from a subsequent independent transaction" *(U. S. v. Fox,* 95 U. S. 670).

This ingredient of criminal intent must, like any other ingredient of the offense alleged, be established by this agreed statement of facts beyond all reasonable doubt before this judgment can be sustained. The agreed statement of facts must explicitly establish, to the exclusion of all reasonable doubt, that there was, at the time and place alleged, a "wicked, corrupt and felonious" conspiracy by these plaintiffs in error to hire or retain the various named persons to go without the jurisdiction of the United States, with the intent on the part of all concerned that such various named persons should enlist in a foreign military service as soldiers; that is to say, it must be established, that these plaintiffs in error "wickedly, corruptly and feloniously" conspired to hire or retain the various named persons to go beyond the United States, such persons having the intent to enlist in a foreign military service on arrival at their destination, and that intent being known to and understood by the plaintiffs in error, and that intent being shared by the plaintiffs in error, and being a portion of the consideration for the hiring or retaining before the hiring or retaining *(Hertz* case, supra). In other words, it must explicitly appear from and by this agreed statement of facts, beyond all reasonable doubt, that these plaintiffs in error, "wilfully, corruptly and feloniously" conspired to hire or retain those named persons for the purpose mentioned, and with the criminal intent mentioned, that criminal intent being common

to, known to, understood by and participated in by both parties to the hiring or retaining *(Hertz* and *Kazinski* cases, supra). For it is elementary and common learning in this department of the law that a statement of facts which leaves it doubtful or uncertain whether an essential ingredient of the offense alleged is or is not established in a criminal cause beyond all reasonable doubt, is insufficient for any purpose in the criminal law; the criminal law does not permit the conviction of an accused person save and except upon such evidence as removes all reasonable doubt.

And it should be added that intention must be distinguished from expectation, supposition, belief or presumption. Intention is the purpose or design with which an act is done; but expectation is not intention. An operating surgeon may expect that his patient may probably die of the operation; but he does not intend that consequence; on the contrary, he intends the recovery of the patient. An Englishman may assist fellow countrymen home by providing sustenance and transportation for them. If a war be in progress in which Great Britain is concerned, and if fit men are needed both for military purposes and for the various branches of the national service of all kinds, he may suppose, believe, presume, expect and hope that the men assisted home will enlist as soldiers; but that mental condition is readily distinguishable from criminal intent to violate the municipal law of the United States; all that the Englishman intends in the case supposed is the return of his fellow countrymen to England, where they are free to enlist or not as they please, where they are

free to enter some branch of the National service or not, as they please, where they are free to do neither if that pleases them. Expectation or hope that a consequence will follow is an attitude of mind quite distinct from intention.

Complaint was seasonably made as to the failure of the court below to instruct the jury upon this subject-matter of criminal intent (Trans. 161), and that complaint is renewed here (Assignments of Error 23, 24). But in view of the nature of this complaint, we do not conceive it necessary to present more than one or two authorities in support of it,—indeed, the principle appealed to by us would seem too well grounded to require any support whatever. In a leading New Jersey case, an indictment was returned against the members of a board of chosen freeholders for combining to vote a sum of money out of the county funds to a third person, but the indictment did not charge that the confederation was corrupt, or that the third person, to the knowledge of the defendants, was disentitled to the money. In holding the indictment bad, the court took the position that to constitute a combination and conspiracy, it must be corrupt; and then, after pointing out that *Commonwealth v. Callaghan,* 2 Va. Cas. 460, "stands alone", proceeded to say:

> "That case, as it stands, however, is analogous to the present case in that the first deals with the conduct of members of a body to whom is confided the appointment of public officers, and this case deals with the action of members who have in charge the moneys of the public. In regard to the latter aspect of this question, while it may be observed that the vast and vague field now covered by the law of criminal conspiracy needs circum-

scribing rather than expanding, yet a case is conceivable where a combination of members of such a body as a board of chosen freeholders, the object of which is to defraud the county by their official votes, may be criminal. It may not be easy to exactly define by a general formula what elements of fact are essential to constitute such a combination a criminal conspiracy; but it may be safely said that the motives of the confederates must be corrupt, or no criminality can attach to such a confederation. This remark is illustrated by the case of People v. Powell, 63 N. Y. 88. The defendants were commissioners of charities of the county of Kings, and were indicted for conspiring together to omit, refuse and neglect to advertise for supplies as required by statute. Upon the trial, the judge charged that, without regard to the defendants' ignorance of the existence of the statute, the agreement to violate the act, followed by conduct in furtherance of the agreement constituted a conspiracy. This was held error; the court remarking that it was not enough that the act which was the object of the conspiracy was prohibited. The confederation must be corrupt. The actual criminal intention belongs to the definition of conspiracy, and must be shown to justify a conviction."

Wood v. State, 47 N. J. Law 461; 1 Atl. 509, 510, 511.

And so, likewise, in a well known and frequently cited New York case *(People v. Flack,* 125 N. Y. 136; 26 N. E. 267), the defendants were accused of conspiracy to falsely institute and maintain an action to recover a judgment of divorce, and to pervert and obstruct the due administration of the laws and of public justice; a conviction resulted. But this conviction was reversed by the Court of Appeals in an opinion which we venture to believe, fully sustains our contention as to the necessity for proof of the criminal intent beyond all reason-

able doubt. In this opinion, after fully stating the facts, the learned court proceeds:

> "The gist of the crime of conspiracy consists in a corrupt agreement between two or more individuals to do an unlawful act, unlawful either as a means or as an end. 2 Bish. Crim. Law, Secs. 171 et seq. and cases cited. The agreement may be established by direct proof or by inference, as a deduction from conduct which discloses a common design on the part of the persons charged to act together for the accomplishment of the unlawful purpose. At common law the crime of conspiracy was complete when a corrupt agreement was made, although not followed by any overt act, and no step had been taken in furtherance of the object of the conspiracy. The statute of New York has modified the common law in this respect, by requiring that, to constitute the crime of conspiracy, there must be both an agreement and an overt act to effect the object of the agreement, except where the conspiracy is to commit certain felonies specified. Pen. Code, Sec. 171. The formation of a common design by two or more persons is never simpliciter a criminal conspiracy. This may be and often is perfectly innocent. The criminal quality resides in the intention of the parties to the agreement, construed in connection with the purpose contemplated. The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. In many cases this inference would be irresistible; in others the jury might find that, although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance, without any actual criminal motive. If that conclusion should be reached by the jury, then, whatever other criminal penalties the parties might have incurred, the crime of conspiracy would not have been established, and the defendants would be entitled to an acquittal. The actual criminal or wrongful purpose must accompany the agreement, and, if that is absent, the

crime of conspiracy has not been committed'' (26 N. E. 269, 270).

And then, after referring to several New York cases, the court added:

> ''The presumption that a person intends the ordinary consequences of his acts is, as applied to criminal cases, a rule to aid the jury in reaching a conclusion upon a question of fact, and is not a presumption of law, and on the trial of an indictment the intent is traversable, and the defendant may testify as to his intent'' (page 270).

And as to this last remark, see also, *Wallace v. U. S.*, 162 U. S. 466, 477-8.

It will be remembered that, in his charge to the jury, in the cause at bar, the learned judge made no reference to the question of criminal intent as an element of the crime of conspiracy. It would seem that the learned judge was of opinion that the law presumed a criminal intent if the acts done were unlawful; in all events criminal intent as an ingredient in the offense charged was ignored by the learned judge in his charge, and wholly disregarded; and concerning this action, complaint was made below and is repeated here (Trans. 161, Assignments of Error 23, 24). But when a similar situation was presented to the Court of Appeals of New York in the case above referred to, that learned court disposed of the situation thus:

> ''The learned judge, in his main charge, made no reference to the question of criminal intent as an element of the crime of conspiracy. It would seem that he was of opinion that the law presumed a criminal intent if the acts done were unlawful. We think valid exceptions were also taken to the instructions upon this subject

and to rulings made subsequent to the main charge. The record shows that one of the counsel for the defendants, after the main charge had been concluded, said to the court: 'You do not mention the presumption of innocence.' The court after instructing the jury upon the point to which its attention had been called, then said: 'I ought to say, not as a supplement to the proposition, but as an independent proposition, that ignorance on the part of the defendants, or any of them, of the meaning of this statute (Conspiracy Statute), cannot be a shield to them if you believe they have committed the acts. If you believe beyond a doubt that they have committed the acts which constitute the offense, as I have defined it to you, then they are guilty.' On exception being taken to this instruction, the court said: 'I refer to that because you will recollect that each of these defendants when put upon the stand, were asked if they had conspired, if they had perverted the law or perverted the administration of justice, and William I. Flack at one time said he did not know what that meant. Of course, gentlemen, this is of no consequence. The question is whether they have done the acts which bring the case within the language of the statute, the perversion of justice or of the due administration of the law.' The court, in these instructions, disregarded the fundamental rule that a criminal intention must accompany the act in order to constitute crime, and that the act, while it may be the basis for the inference of a criminal intention by the jury, and is frequently irrefragible evidence of such intent, if unaccompanied by such criminal intent, is not a crime."

People v. Flack, 125 N. Y. 324; 26 N. E. 267.

And see this New York case cited as authority in: *Pereles v. Weil,* 157 Fed. 419, 422. And it may be added, in further illustration of this subject-matter, that a charge in a criminal case, in which intent was an essential element of the offense alleged, that such intent may be presumed from the doing of the wrongful or illegal act, and that such presumption cast the burden on the

defendant to overcome it by evidence sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no such guilty intent, is erroneous, and constitutes reversible error.

German v. U. S., 120 Fed. 666;
McKnight v. U. S., 115 id. 972.

And since an agreed statement of facts is assimilated to a special verdict, it may not be improper to direct attention to *U. S. v. Buzzo,* 85 U. S. (18 Wall.) 125, where the Supreme Court held that where the intent is the essence of the crime, and is not found, no judgment can be entered on the special verdict; and in that connection, it was observed by Mr. Justice Bradley that

> "An imperfect verdict, or one on which no judgment can be rendered, must be set aside, and a venire de novo awarded."

(b) *Specific Intent:*

In the next place, it is proper to suggest that a distinction obtains between the general criminal intent to which we have referred, and the specific intent so frequently referred to in the authorities. The law regards some acts in themselves as crimes, without reference to the purpose which they were intended to accomplish; but other acts become criminal only when performed with some particular purpose or design. In the latter class of cases, this design enters into the nature of the act itself, and is called the specific intent; and this specific intent is not to be confounded with the general intent. Where a specific intent enters into the crime charged, it cannot be inferred from acts alone which, without such specific intent, would not constitute the

crime charged (*Simpson v. State,* 59 Ala. 1; *Patterson v. State,* 85 Ga. 131; *Roberts v. People,* 19 Mich. 401; *Maher v. People,* 10 id. 212). Unless the specific intent is proved beyond all reasonable doubt, the offense is not made out (*State v. King,* 86 N. C. 603; *Doolittle v. State,* 93 Ind. 272; *Dunaway v. People,* 110 Ill. 333; *Crosby v. People,* 137 Ill. 325; *State v. Doyle,* 107 Mo. 36; *Shinn v. State,* 68 Ind. 423); and where a specific intent is laid in the indictment, but the proof exhibits another, the variance is fatal (*Robinson v. State,* 53 Md. 151; 36 A. R. 399; *People v. Manahan,* 70 N. Y. S. 108, holding that the lower court erred on the trial of the indictment for conspiracy, in refusing to allow the defendant to introduce evidence of his motive or purpose in doing an act claimed by the prosecution to show the purpose of the conspirator). The specific intent, as part of the alleged criminal act, must be both alleged and proved to the same degree of moral certainty and beyond all reasonable doubt, and in the same manner, as any other portion of the offense alleged; it must be found as an independent element in the case; concerning it, no presumption whatever can be indulged; and, as observed by the Supreme Court of California,

> "When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent."
>
> *People v. Landman,* 103 Cal. 577, 580; followed, *People v. Johnson,* 106 id. 289, 295.

In the former of these cases, the court declared that no burden should ever be cast upon a defendant of introducing evidence to disprove a state of facts created

by a presumption of law; and in the latter, the Supreme Court speaking of the trial court, observed that

> "the question of the intent with which the assault was made, being the material element in the case, the court had no right to put a state of facts to the jury which would bar them from finding the intent to be other than that charged by the information."

Why, then, did not the learned judge of the court below direct the attention of the jury to those aspects of the case which are concerned with criminal intent and specific intent? No direction of the learned judge to the jury would, we think, be right which ignored these essential ingredients of the offense charged; because if these plaintiffs in error did the acts and things stated in the agreed statement of facts, not with the intention of violating either Section 37 or Section 10 of the Federal Penal Code, but because, as learned judges and the Supreme Court itself have frequently declared, it is not a criminal act to leave the United States to enlist in foreign military service, nor is it a criminal offense to transport persons leaving the United States to enlist in a foreign military service, they conceived it to be no crime to assist their fellow countrymen to do what they had a perfect right to do, namely, to go back to Great Britain, then neither the general criminal intent, nor the specific intent, essential under this indictment, would have been proved. But the intention of the jury was never directed to this aspect of the case, and we urge the failure to do so as a reversible error. We respectfully contend that the jury should have been told to consider, not merely the bare acts of the defendants, but also the intention and purpose of the defendants in do-

ing those acts, for it cannot be doubted that such intention and purpose, under the general doctrines of federal criminal jurisprudence, and under the allegations of this indictment, were ingredients of the offense alleged, and were therefore highly material to the issue of guilt or innocence which was before the court and jury below. Unless the intention and purpose of the plaintiffs in error in doing whatever is recited in the agreed statement of facts, were evil; unless they were animated by the criminal intent to violate Section 37 by conspiracy with the specific intent to violate Section 10; and unless they did the recited acts with that object, the verdict below was wrong, and the ensuing judgment should be reversed.

Rex v. Ahlers, infra.

But these plaintiffs in error, by their plea of not guilty, have denied and repudiated any intent to violate either Section 37 or Section 10. From the agreed statement of facts, we think it apparent that their purpose was to assist on his way home, as far as New York City, any fit man who wished voluntarily to return; they exacted no agreement to enlist as a condition precedent to the giving of this assistance; they hired or retained no man to go abroad with intent to enlist; they obeyed consular instructions which prevented any such thing, and they were entitled to have the jury correctly directed upon this phase of the case as well as upon others. Nowhere throughout this agreed statement of facts is it anywhere recited as one of the agreed facts in this case, that the intention of these plaintiffs in error, whether general or specific, was the criminal intent to

violate Sections 37 and 10, or, to use the language of the indictment, was "wicked, corrupt and felonious". Not only does this fact nowhere appear among the facts agreed upon in this criminal case which was presented solely upon a written statement of "the facts in the cause", but many facts do appear in that written statement which exhibit the absence of any criminal intent, whether general or specific, and which emphasize the necessity for a proper direction to the jury upon that subject-matter.

Is there any legal reason why the good character of these plaintiffs in error should not have been considered, not only in aid of the presumption of innocence, not only to fortify the improbability that they would commit the crime charged, but also in support of their claim of the absence of any form of criminal intent, and to repel any imputation to them of such intent? Nor will it do to say that the agreed statement of facts exhibits no affirmative evidence of good character; because the rule is that in a criminal trial in a federal court, the accused need not call witnesses as to his general good character, and, where no testimony on that subject has been offered, he will be taken to be of good character until the contrary shall have been shown beyond all reasonable doubt *(U. S. v. Guthrie,* 171 Fed. 528; *Mullen v. U. S.,* 106 id. 892).

In the next place, the agreed statement of facts makes it clear in paragraph 2 that the King was desirous of the return to Great Britain of British subjects for a double process, namely, for employment in the army and navy, and also for employment in the various

branches of the national service of all kinds. No claim can be seriously made that sending fit men home for employment in any one of the various branches of the national service of all kinds, is offensive to any section of the Federal Penal Code. No more comprehensive terms could have been employed to include every conceivable kind of labor or avocation, whether of the hand or brain; and as if to emphasize and make more explicit the intention that the words "national service" should not be taken in any restricted sense, they are followed by the significant words "of all kinds". In other words, every kind of industry and every employment, whether manual or intellectual, in the service of the nation, is embraced within the language used. And it may be added that since reference had already been made in paragraph 2 to employment in the army and navy, it must be obvious that other employments, distinct from employment in the army and navy, are contemplated by employment "in the various branches of the national service of all kinds". The language used plainly discriminates, we think, between the two forms of activity —between military service and other forms of service; and if military service were intended to be included within the phrase "the various branches of the national service of all kinds", there would have been no occasion whatever for the wholly unnecessary and tautological expression "employment in the army and navy".

There was, then, a need for fit men in "the various branches of the national service of all kinds"; and the defendants below were, and they are now, entitled to appeal to that very need in order to strengthen their

claim that, in aiding British subjects to return home, their intent was not to violate either Section 37 or Section 10,—was not an intent to hire or retain any man to return home for army and navy purposes as distinguished from national service purposes. While they "supposed, believed and presumed" that the men would enlist (paragraph 45) yet no word passed between them and the men upon that subject (paragraphs 45, 55); and they knew, as every intelligent person must be taken to know, that in times of war the usual peace methods of transacting government business,—the ordinary red tape regulations, must be in great part suspended; they knew that what the nations want when at war is armament, equipment, vehicles, stores of all kinds, guns, shells, explosives, chemicals, fuses and similar supplies; they do not want the red tape that so often strangles and that always takes so long to unwind; and they cannot get these vital supplies without the prompt, ready, willing and efficient co-operation of the workers at home, as distinguished from the fighters in the trenches. Taking this agreed statement of facts as a whole, we think it must be obvious that the conduct of Messrs. Blair and Addis is entirely as consistent with the sending home to England of men who were not cripples, for employment in the various branches of the national service of all kinds, as it is with any other hypothesis, —in which latter event, no offense whatever would be disclosed and the jury should have been instructed to acquit. The fact is, and it is common knowledge, that in modern warfare success depends upon and demands, not only patient preparation, but also efficient organization and superior equipment and armament. There

must be an intelligent division of labor; and men must be so classified and distributed that the nation may reap the most advantageous results. This is not a mere military problem; the industrial aspect of the matter is quite as vividly important as the army with the colors; and there never was a war in which men were not in the trenches who should have been in the factories, and in which men were not in the factories who should have been in the trenches—there never was a war in which labor in the various departments of national service was not fully as necessary to national success as the bravery of the troops in the field. That the troops in the field, and the re-enforcements sent out to them, must be thoroughly equipped and found with ammunition, vehicles and stores of all kinds, is a self-evident proposition; and consequently men are needed, not only to serve in the ranks, but also to supply, and to continue to supply, the necessary arms, ammunition, equipment, vehicles and stores—necessaries without which the troops in the field could not fight.

When a nation is at war, it needs all the machinery that is capable of being used for turning out munitions, equipment and stores, all the skill that is available for that purpose, all the industry, labor, strength, power and resource of its citizens; able-bodied and fit men are needed to meet the strain; the armament firms, the factories for war material, and the ancillary trades, must undertake orders of vast magnitude; the men in the workshops must work overtime and in night shifts; the troops must be equipped and supplied; and it is a postulate that the output of arms, ammunition, equip-

ment, vehicles and stores has a very vital and commanding influence upon the operations in the field.

This great but necessary output can only be obtained by a careful and deliberate organization for developing the resources of the country so as to enable each able-bodied and experienced man to utilize in the best manner possible all his ability and energy. In maintaining the soldiers in the field or the sailors upon the sea, with those necessaries without which they cannot fight, the men working at home perform a very necessary, important and patriotic task; because, if they did not pull with the nation, the machine of war would become clogged and demoralized, and defeat would ensue.

The immensity of the issues at state, the serious hamper by failure to obtain sufficient labor, the equally serious effects of delay, the abiding seriousness of the consequences of disaster,—all these considerations, and others that the mind will suggest, concur to subordinate all activities to the great national purpose, and to evoke the strength which arises from concentration upon such purpose. All rules which, in times of peace, needlessly or artificially limit production, become suspended in times of war; and all ordinary customs and habits remain in abeyance while the whole strength of the nation, exerted through different and varied channels of national service, is directed toward the successful termination of the war. And to all this, these plaintiffs in error have a right to direct attention as adding probability and strength to their claim that they were as innocent of the intent as of the act.

Moreover, there is nowhere stated in any paragraph of the agreed statement of facts any fact of secrecy, or mysteriousness, or deception of any sort, or any methodical effort to collect soldiers or sailors, or any inducement or solicitation, or pretense of solicitation or inducement, of any men or man to be hired or retained for any foreign enlistment: nor does it appear that these plaintiffs in error violated any other provision of law; and even if it were true, which it is not, that they had used secrecy, mysteriousness or deception, or had violated some other provision of law, still that would not bring them within the statute involved here if they were not otherwise within it,—"the case alleged must, of course, be proved; otherwise the defendants are entitled to a verdict of not guilty" (per Ross, J., in *U. S. v. Turnbull,* 48 Fed. 99, 108; and see also *U. S. v. Ybanez,* 53 Fed. 536; *U. S. v. Hart,* 74 id. 724; *U. S. O'Brien,* 75 id. 900; *U. S. v. Nunez,* 82 id. 599.) And in addition to this, the agreed statement of facts does not disclose one single solitary instance in which any hiring or retaining of any men here to go abroad for this foreign enlistment, was ever entered into; and more than this, while the mental attitude of the defendants upon this matter of foreign enlistment was purely subjunctive, doubtful and uncertain, while it was the "individual" intent of a "majority" of the men who enlist, while the fact of the communication of this individual intent by this majority of the defendants is nowhere agreed to, it also appears from the agreed statement of facts that no word on the subject of foreign enlistment ever passed among the persons concerned. The fact is that, had the defendants

entertained the criminal intent, whether general or specific, which is an ingredient of the offense charged, there would have been no difficulty in stating that fact: there was no difficulty in stating the "individual" (though uncommunicated) intent of the "majority" referred to in paragraph 45: but nowhere throughout this agreed statement of facts is this fact stated of or concerning these plaintiffs in error—the agreed statement of facts nowhere pretends to make any statement whatever as to the intent of the accused persons. All of these facts may well be appealed to by these plaintiffs in error in support of their contention that the accuser has wholly failed to establish beyond all reasonable doubt that they were actuated by that criminal intent which is an essential part of the offense charged. Openness of conduct has always been regarded as inconsistent with evil intent and the convincing fact that the plaintiffs in error neither hired nor retained, nor attempted to hire or retain any man whatever to go abroad for foreign enlistment, effectually negatives the claim that it was their purpose to do that thing,—especialy since no improper intent of the defendants is agreed to in the statement of facts, and especially since the defendants had ample time and opportunity so to hire and retain men if such had been their intention. Even the learned judge of the court below concedes that "it may be true that they believed they were acting within the law", but if they believed that they were acting within the law, then they did not believe that they were violating the law: where, then, is the criminal intent, general or specific?

The importance of criminal intent, as an ingredient to be established by the accuser to the exclusion of all reasonable doubt may be illustrated by the recent decision in a cause growing out of the same war referred to in paragraph 1 of the agreed statement of facts in the cause at bar. The case was that of Nicholas Ahlers. He was tried in December, 1914, at the Durham *Assizes* for high treason. He had been the German consul at Sunderland, England. He was a naturalized British subject. The jury unanimously decided that although himself a naturalized British subject, yet he incited and assisted a number of German reservists to join the German forces, knowing that war had broken out between Great Britain and Germany. The fact of the incitement and assistance was hardly disputed. The whole case turned on the question of knowledge of the war. Most, if not all, of the specific instances of assisting the enemy, given in evidence at the trial, occurred on August 5th; and the plea of the defense was that at the time in question Ahlers was ignorant of the declaration of war between the two countries. The conviction of Ahlers was annulled by the Court of Criminal Appeal; and, from the report of the case in the Official Reports of that court, it appears that the indictment alleged the existence of a state of war between the German Emperor and his subjects and the King and his subjects, and alleged that the appellant, Ahlers, being a subject of the King, and well knowing the pendency of this state of open and public war, and contriving and intending to aid and assist the enemies of the King during the war, maliciously and traitorously adhered to and aided and comforted the King's enemies. The overt act alleged

in the first count of the indictment was the endeavor to procure one Martin, a German subject, to leave England and go to Germany and there enter the military service of the German Emperor. In various other counts of the indictment, similar overt acts were alleged with regard to a number of German subjects, named and unnamed: and these overt acts included not only the publication of a document in German, issued by the Imperial German Consulate on August 5, 1914, requesting all men able to bear arms, between 17 and 45, to report at once to the Consulate with their military papers or other credentials, but also the payment of money to one Biemann, a German subject.

By birth the appellant was a German subject who had lived in England for about 30 years, and who in 1905, became a naturalized British subject. From 1905 to and including August, 1914, he was the German consul at Sunderland. On August 1, 1914, Germany declared war against Russia, and on August 3rd against France. A supplement to the London Gazette of August 4th was published on August 5th containing an announcement dated August 4th, issued by the Foreign Office, that a state of war existed between Great Britain and Germany as from 11 P. M. on August 4th.

The evidence for the prosecution showed that for a few days before August 5th, and on that day, the appellant had been engaged in obtaining the names of German subjects resident in the County of Durham, who were of an age liable to military service, including those named in the indictment, and assisting them to return to Germany by providing them with money and railway

and steamboat tickets, and supplying them with information as to the routes by which they could travel.

And at the close of the case for the prosecution in the lower court, counsel for the appellant submitted that there was no evidence that the appellant knew that Great Britain was at war with Germany on August 5th: and also that it was not unlawful for the men in question to leave England on August 5th, and that consequently the appellant was not guilty of any offense in helping them to do so. The learned judge of the court below held that there was evidence that the appellant did know on August 5th of the declaration of war; and he also ruled against the second contention. Thereupon the appellant gave evidence, stating that when he did the acts alleged on August 5th he did not know that war had been declared between Great Britain and Germany; and further stated that he was under the impression that after a declaration of war between two countries the subjects of one of the countries living in the other country were allowed a reasonable margin of time in which to return to their own country. The learned judge of the court below told the jury that if they found that the appellant had assisted the King's enemies at a time when he knew that war had been declared between Great Britain and Germany, it was their duty to find him guilty; and that, in that case, it was no defense for the appellant to say that he thought he was entitled to do what he had done even after the declaration of war. The jury returned a verdict of guilty, and the appellant was sentenced to death: but the learned judge gave a certifi-

cate that it was a fit case for appeal on both law and fact.

The grounds upon which the appellant placed his appeal were, in substance, as follows: that there was no evidence in fact, nor any sufficient evidence upon which the jury were entitled to infer knowledge of the existing state of war on the part of the appellant before the afternoon of August 5th: that at the time, the appellant was not aware that the acts he was doing were unlawful, and that he did in fact believe them to be permissible because he was entitled to continue doing acts which he might lawfully do until he was made aware of an official declaration of war, and because in accordance with International Law alien enemies were entitled to a certain period of grace within which they might lawfully leave England and return to their own country: and that in any case, whether the two preceding submissions were or were not well founded, still he honestly believed them to be correct, and in doing the acts alleged against him he did them in the honest belief that they were lawful, and did not do them traitorously,—fairly considered, the evidence showed clearly, he claimed, that he acted openly, innocently and without any traitorous intent.

On appeal, passing by other arguments made on behalf of the appellant, it was urged that it was not lawful for German subjects who were in England to return to Germany on August 5th, and that the appellant in assisting these men to depart was, therefore, not guilty of high treason; and counsel said:

> "If the appellant acted as he did, not with the intention of aiding the King's enemies, but because he con-

> ceived it to be his duty as Consul to assist them to do what they had a perfect right to do, namely, to go back to Germany, then the intent which is the essence of high treason would not be proved. But Shearman, J., never directed the attention of the jury to this aspect of the case, and the jury were left under the impression that if the appellant knew on August 5th that war had been declared they were bound to convict him."

At this juncture, the Lord Chief Justice interposed and said: "We should like to hear the other side of this point."

The Solicitor General then replied, but, let it be said with respect, did not seem to answer the contention on behalf of the appellant, apparently contenting himself with saying:

> "It was never suggested at the trial that the appellant might have been sending these men, who were of a military age, to Germany for some other purpose than that of joining the German army."

The opinion of the court, quashing the conviction, was handed down on December 18, 1914; and in the course of the opinion, the learned Chief Justice said:

> "It was further contended that the jury ought to have been told to consider not merely the bare acts of the prisoner, but his intention and purpose in doing them. It cannot be doubted that his intention and purpose in doing the acts were material to the issue which was then before the jury. Unless the jury were satisfied that his intention and purpose in acting as he did were evil, not to use the more stately language both of the statute and of the indictment; and that he was intending to aid and comfort the King's enemies and did these acts with that object, they could not find him guilty of the act charged. He was charged in the words of the indictment with 'contriving and with all his strength intending to aid and assist the enemies of our Lord the

> King against our said Lord the King and his subjects heretofore during the said war * * * and with force of arms unlawfully, maliciously and traitorously was adhering to aiding and comforting the German Emperor against our Lord the King.' The defense put forward on his behalf at the trial was that, acting in his capacity of a Consul, and with the belief that he had, his object was to assist German subjects to return to their own country, and that his intention was not in any way to injure this country's interest, but merely to carry out his duty and help these German subjects to return to their own country." * * *
>
> "We cannot say that it follows from the evidence that the actions of the appellant were necessarily hostile to this country in intention and purpose; although there was undoubtedly evidence upon which the jury might have so found."
>
> *Rex v. Ahlers,* 1 K. B. (Court of Criminal Appeal, 1915) 616, 624-5-6.

We submit, therefore, that the lower court erred in failing to instruct and direct the jury that not merely the bare acts of the defendants were to be considered, but also the intention and purpose of the defendants in doing any act or acts referred to in the agreed statement of facts should also be considered; that the lower court erred in failing to instruct and direct the jury that the intention and purpose of the defendants in doing any act or acts mentioned in the agreed statement of facts were material to the issue which was then before the jury; and that unless the jury, and the learned judge himself, were satisfied upon reasonable grounds, and beyond all reasonable doubt, that the intention and purpose of the defendants were criminal, and that they did the acts recited with the intention to violate the law, and did those acts with that object, then no verdict of

guilty should have been either directed or found against them in this cause (Assignments of Error, 23, 24).

(c) *Contingent Intent:*

But, again: In approaching this subject of intent, we suggested above that a conditional or contingent intent would not suffice for the purposes of the criminal law. In this action, we venture to suggest that, in seeking an answer to the question as to what it really was that the defendants actually did, as shown by the agreed statement of facts, the distinction should be held in mind between a binding obligation to go abroad for foreign enlistment, upon the one hand, and the giving of aid or assistance to those wishing to return home, upon the other hand; and this distinction is entirely apparent in the *Kazinski* and *Hertz* cases. And it may be added that this distinction is recognized in the alien contract labor law, and the decisions thereunder. In this latter case, instead of sending men out of the country to do service abroad, men are brought into the country to do service here. But neither the prepayment of transportation, nor the assisting or encouraging in anywise of the importation of an alien, is a violation of the alien labor law, without a contract or agreement made previous to the importation or migration binding the alien to perform labor or services in the United States; and the circumstance that the alien labor law itself speaks of this contract or agreement, does not diminish the propriety of the distinction which we are suggesting.

U. S. v. Edgar, 48 Fed. 91;
Maller v. U. S., 57 Fed. 490.

But there was no such agreement, whether verbal or written, between these plaintiffs in error and the men referred to in the agreed statement of facts; there was no such agreement, whether verbal or written, upon either side. The plaintiffs in error were under no compulsion, contractual or otherwise, to send these men without the United States for foreign enlistment; they were not compellable by any agreement to give, nor in point of fact did they give, to any one of these men the money sufficient to get him out of the country; these men never got farther than New York City; and this agreed statement of facts recites no agreed facts or fact that would have authorized these plaintiffs in error to sue any one of these men for any breach of any agreement of hiring or retaining. Not a single man of these men was in any way bound or obligated by any agreement, whether written or verbal, to enlist in any foreign military service; each man could enlist or not, precisely as he pleased; in that regard, as in others, each man was a perfectly free agent; aside from the hazy and undefined "majority" of paragraph 45, the remaining men never intended to enlist at all; and what paragraph, indeed, of this agreed statement of facts of "the facts in the cause" exhibits any duty whatever resting upon these plaintiffs in error to send any one of these men, or upon any one of these men to proceed, farther than New York City, or beyond the limits of the United States?

Not only does the agreed statement of facts wholly fail to show the fact of any combination between Messrs. Blair and Addis to hire or retain men for foreign mili-

tary service; not only does it fail to show the fact of the hiring or retaining of a single man for that purpose, although ample time and opportunity were had, if plaintiffs in error had so intended; not only does this agreed statement of facts fail to show any agreement, whether written or verbal, whereby any one of these men was to enter military service rather than some department of the national service, although the former only is within the purview of Section 10,—but, assuming, for argumentative purposes only, that this agreed statement of facts exhibits a combination between plaintiffs in error, yet a combination to send men to some point in the British Empire is not criminal,—is not a criminal concert or conspiracy; it becomes criminal only when the combination is one entered into with the specific intent to accomplish a specific purpose as distinguished from all other purposes, namely, to hire and retain men to go abroad for enlistment in the British military service. And unless this combination with this specific intent is established by this agreed statement of facts so as to overcome the presumption of innocence by evidence that excludes all reasonable doubt, this judgment, we submit, cannot stand.

And not only is a combination to send men to some point in the British Empire not a criminal conspiracy, but this indispensable specific intent mentioned is nowhere disclosed by this agreed statement of facts. Presently pretermitting the specific intent to accomplish the specific purpose of hiring or retaining men to go from the United States to some point in the British Empire for enlistment in the British military service,

we respectfully insist that this agreed statement of facts fails to disclose any combination between Messrs. Blair and Addis even to send men to some point in the British Empire. Such a combination is not disclosed by the formation of the British Friendly Association: because that association "had no other business, and was organized for no other purpose, than to facilitate the transportation to New York of British subjects sound in body and limb (Par. 17). Nor is such a combination disclosed by the purchase of the railroad tickets: because, in every instance, the transportation called for by such tickets was to terminate at New York City (Pars. 22-28). Nor is such a combination disclosed by the sustenance money: because that was limited to New York City (Pars. 21, 39, 40). Nor is such a combination disclosed by any agreement, made in San Francisco, to send any of these men to any point in the British Empire: because we are not advised by the "agreed facts in the cause" that any such agreement was ever made by any person, at any time or place, or under any circumstances. Whether the men would go beyond New York was contingent upon their willingness to do so: they could not be compelled.

There was, indeed, no way in which these plaintiffs in error could compel any one of these men to enlist in the British military service: if they helped these men to return under the supposition, belief and presumption, and in the hope and expectation that the men would so enlist, then such supposition, belief, presumption, hope and expectation,—all of which terms convey the idea of something in the mind independent of reality,—would be contingent upon the willingness of the men themselves

to enlist upon reaching their destination: but that would obviously not be a hiring, retaining or engaging, within the United States, of men to enlist abroad, within the meaning of this criminal statute. A binding written or verbal obligation to enlist abroad, upon the one hand, and a supposition, belief, presumption, hope or expectation of foreign enlistment, upon the other hand, are wholly distinct mental attitudes; and there is a plain and readily recognized distinction between an intent or purpose that is fixed and settled by a binding obligation or agreement, and a mere supposition, belief, or presumption that is contingent, dependent or conditional upon the willingness of others.

The views here expressed upon this subject-matter of contingent intent are, we venture to believe, supported by:

U. S. v. Quincy, 31 U. S. (6 Pet.) 445, 465-6;

U. S. v. Lumsden, 26 Fed. Cas. (No. 15,641) 1013, 1014, 1015, 1018, 1020. T. B. 90-91.

THE ERRORS IN DETAIL.

In preparing the assignment of errors as they appear in the transcript, we numbered them consecutively for convenience of reference. Our references to the errors assigned will give the page of the transcript, where found, and will give the number of the assignment.

The first error to be considered is, that the District Court erred in charging and instructing the jury, that "as to the defendants Ralph K. Blair and Thomas Addis

you will return a verdict of guilty upon the first count'' (Trans. p. 190; *error 21).*

As the facts set forth in the agreed case, standing alone and unaided by inferences, are insufficient to establish a conspiracy as charged in the first count, it was clearly error to direct the jury to return a verdict of guilty against the plaintiffs in error upon that count. It was error not only because the facts standing alone do not warrant such a verdict, but also because under the law the court has no power to direct such a verdict, no matter what the facts may be, and because under the stipulation of the parties such a power was not to be exercised by the court, if, before the court became convinced of the guilt of the plaintiffs in error, it was necessary for the court to piece out the facts, as set forth in the agreed case, with such inferences and presumptions as the court might, in its opinion, have thought logically permissible. It was error, because even assuming the propriety of piecing out the facts set forth in the agreed case with inferences, such a piecing-out process must stop short with the first inference and cannot be carried to such an extent that a conclusion of guilt is the result of ''piling inference upon inference.''

> ''These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact,

the circumstances must be proved, and not themselves presumed."

U. S. v. Ross, 92 U. S. 281, 283, 284 (italics ours).

Vernon v. U. S., 146 Fed. 121, 126, and cases there cited.

It was likewise error for the court, in reply to the motion of plaintiffs in error to direct a verdict in their favor (Trans. p. 151), to instruct the jury that as to these plaintiffs in error the motion was denied as to the first count in the indictment (Trans. p. 190; *error 20).* For the facts set forth in the agreed case standing alone, unaided by inferences, were insufficient to establish the conspiracy charged against the plaintiffs in error in the first count, and the motion of plaintiffs in error, that a verdict of not guilty be directed, should therefore have been granted and allowed. An agreed case, like a special verdict, must be treated as complete in itself, and inferences therefrom cannot be drawn to aid it.

U. S. v. Buzzo, 18 Wall. 125.

Burr v. Des Moines Co., 1 Wall. 102.

If, however, the agreed statement of facts was not sufficient in itself and contained items of evidence only, the court should have refused to act upon it as an agreed case *(Burr v. Des Moines Co.,* supra,) and either have granted the motion of the plaintiffs in error for a verdict of not guilty, because of the failure of the Government to submit a sufficient agreed case; or, recognizing that the stipulation of the parties did not contemplate that, if inferences of fact were to be indulged, they were to be drawn by the court, the case should have been submitted to the jury, and the jury should have been advised

that they were the appropriate tribunal to weigh conflicting inferences of fact; and the question of what inferences of fact were to be drawn should then have been left to the jury under proper instructions as to the law in the case.

We believe that the two errors just referred to are fatal to the conviction in this case, because we are satisfied that, viewed within its four corners, the agreed statement of facts in this case must be considered as a statement of ultimate facts and therefore must be regarded, in form, as sufficient in itself and that, accordingly, the guilt or innocence of the plaintiffs in error must be measured by the facts therein set forth, unaided by inferences, and that, as so weighed, the facts fail to establish the conspiracy charged in the first count. We feel that this was the view of the case taken by the District Court, and that the conviction of guilt, produced in the mind of the court, was not consciously the result of the mental processes of drawing inferences; although we feel confident that we have established, in fact, that the conclusion in the mind of the court, that the plaintiffs in error were guilty, must have rested not alone upon the facts set forth in the agreed case, but also upon the inferences drawn by the court therefrom.

But if this court should be inclined to the view that the agreed statement was not sufficient in itself, but set forth mere evidentiary facts, which with inferences drawn or to be drawn therefrom might be sufficient to establish the guilt of the plaintiffs in error, then we urge that the case should have been submitted to the jury and the jury should have been advised that they

were to determine what inferences were to be drawn from the facts set forth in the agreed case, and that then proper instructions as to the law should have been given to the jury, to aid them in weighing the various inferences which the facts, set forth in the agreed case, might suggest. This course, however, was not taken by the court, but the court directed that a verdict of guilty on the first count be returned by the jury against the plaintiffs in error, in the following language:

> "The jury will, therefore, in accordance with the stipulation of the parties *and these instructions.* * * * As to the defendants Ralph K. Blair and Thomas Addis you will return a verdict of guilty upon the first count" (Trans. p. 152). (Italics ours.)

In the course of the instructions referred to, the court stated, as facts in the case, many matters which were actually only the inferences of the court drawn from the facts stated in the agreed case. It unduly emphasized certain features of the case and ignored others, and thereby surcharged the atmosphere of the case to the prejudice of the plaintiffs in error. If this court, declining to regard the situation in the light of an agreed case, would ordinarily be inclined to presume, in support of the verdict and the judgment in the case, that the jury had drawn such inferences of fact, as, with the facts set forth in the agreed statement were essential to support the verdict of guilty, then we claim that such a presumption should not be indulged by this court in this case, because it is evident that such presumed inferences were the result, not of the free action of the jury, but of the pointed suggestions and serious misdirections to the

jury upon the part of the court. The particulars supporting these claims will now be considered.

THE INSTRUCTIONS WHICH GAVE FALSE COLOR TO THE CASE.

The crux of this case is, whether the plaintiffs in error hired or retained men, or conspired to hire or retain them, to go beyond the limits of the United States with intent to be enlisted or entered in the service of the King of Great Britain and Ireland as soldiers. To make out an offense of hiring or retaining, a definite contract of hire is essential. Thus, in

U. S. v. Kazinski, 26 Fed. Cas. No. 15,508, the court said:

"A distinct hiring or retaining by the defendants must be shown" (p. 685).

So, also, in the case of

U. S. v. Hertz, Fed. Cas. No. 15,357, the court said:

"If there be an *engagement on the one side* to do the particular thing, to go beyond the limits of the United States with the intent to enlist, and *on the other side an engagement,* that when the act shall have been done, a consideration shall be paid to the party performing the services or doing the work, the hiring and retaining are complete. The meaning of the law, then, is this: That if any person shall engage, hire, retain or employ another person to go outside of the United States to do that which he could not do if he remained in the United States, viz, to take part in a foreign quarrel; *if he hires to go,* knowing that it is his intent to enlist when he arrives out—to enlist and engage him, or carry him, or pay him for going, *because it is the intent of the party to enlist;* then the offense is complete within the section. * * * It is the hiring of the person to go beyond the United

> States, that person having the intention to enlist when he arrives out, and *that intention known to the party hiring him, and that intention being a portion of the consideration before he hires him*, that defines the offense'' (pp. 294, 295; italics ours).

The court in giving its opinion and instructions to the jury did not direct their attention to the fact that a "distinct hiring or retaining" must be shown, did not emphasize or refer to the necessity of a meeting of the minds of the parties on a common object as the essential characteristic of a contract; but on the contrary emphasized only the necessity of a consideration to establish a contract; referred to the fact that the furnishing of transportation and sustenance money was sufficient as a consideration; and, by innuendo, suggested that the plaintiffs in error had thought to evade the Neutrality Statute, on the theory that no consideration for their contracts of hire could be established, because that consideration took the form of the payment, merely, of sustenance money and transportation. In other words, it took it for granted that the contract of hire was established, provided the one element of consideration was proved. Thus, quoting only in part from the decision of

U. S. v. Hertz, supra, the court said:

> "The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another * * *. Moreover, it is not necessary that the consideration of hiring shall be money. To give a person a railroad ticket, that cost $4.00, and board and lodge him for a week, is as good as a consideration for the contract of hiring as to pay him the money with which he could buy the railroad ticket and pay for his board himself'' (Trans. pp. 184, 185; *error 8*).

We do not assert that, if there were a contract of hiring, the payment of sustenance money and transportation would not establish the consideration for the contract; but we do insist that because the giving of sustenance money and transportation is shown, which might constitute the consideration for a contract, if a contract had been proved, it does not follow that a contract of hire is proved by establishing merely what might be a good consideration therefor.

As though to emphasize the impressions, which the court entertained, that all the Government had to establish was a consideration, and that then the contract of hire was proved, and that the plaintiffs in error had been hiding in false security behind a mistaken belief that the furnishing of sustenance and transportation could not be construed as a consideration for any contracts they might attempt, the court continued to instruct the jury as follows, quoting from an opinion by Attorney-General Cushing of 1855 *(7 Opinions of Attorneys-General, pp. 377, 378)*:

> "It is possible that he may have supposed that a *solemn contract of hiring in the United States is necessary to constitute the offense. That would be a mere delusion.* The words of the statute are 'hire or retain' * * * A party may be retained by a verbal promise, or by invitation for a declared or known purpose. *If such a statute could be evaded or set at nought by elaborate contrivances* to engage without enlisting, to retain without hiring, to invite without recruiting, *to pay recruiting money in fact, but under the name of board, passage money,* expenses or the like, it would be idle to pass acts of Congress for the punishment of this or any other offense" (Trans. pp. 185, 186; *error 9;* italics ours).

After making this quotation from the opinion of the Attorney-General, the court continues:

> "I have adopted these quotations because they seem to me to state accurately the meaning of the law, to be well within its terms, and to afford the *only* construction that will render it effective for the purpose for which it was intended" (Trans. p. 186; *error 9;* italics ours).

It would be hard to find language more completely calculated to prejudice a jury than the foregoing quotation, taken in connection with the facts in the case. No insistence was made upon the necessity of establishing a definite contract of hire, but on the contrary the controversy was treated as though the only question at issue was whether a consideration for the contract of hire was established, and as though, when the so-called consideration for an alleged contract which had not been proved, took the form of the payment of board and passage money only, it constituted an attempt to pay recruiting money in fact but under such a disguise as to evade the statute or set it at nought. However appropriate the opinion of the Attorney-General may have been with reference to the facts under review by him, it was certainly calculated to create a false impression in the minds of the jury in the case at bar. No definite contract of hiring has been established in the case at bar by the facts set forth in the agreed case, nor has any conspiracy to make such contracts been established by the agreed case. And yet in the instructions to the jury we find such a definite contract of hiring assumed, and stress being laid upon the feature of consideration only, and laid upon it in such a way as to suggest to the jury that this particular form of consideration had been

adopted by the plaintiffs in error for the purpose of evading the statute and setting it at naught.

The agreed statement of facts sets forth that Great Britain and her Allies were in a state of war with the German Empire and her Allies (Trans. p. 99, Par. 1). Therefore, so far as the jury was concerned, the existence of a state of war was before it as a fact in the case. Some point, however, had been urged by the plaintiffs in error, going to the sufficiency of the indictment through its failure to allege a state of war, to which reference has already been made. The fact that such a point had been raised on the pleadings was a matter of no concern to the jury, and yet the court in instructing the jury, as though to impress upon them the necessity, in the interests of the United States Government, of finding the plaintiffs in error guilty, after stating that the statute in question "could be violated as well at a time of universal peace as it could be at a time of almost general war," said further:

> "In other words, it is not essential to a violation of this section that war should exist anywhere at the time of such violation, although *in times of war among other nations with which this Government is at peace, a violation of the section on behalf of one of the belligerents* by hiring or retaining men here to go abroad with intent to enlist in the army or navy of such belligerent and assist in carrying on the war against other nations, with which this Government is upon friendly terms, *might well be regarded by the Government with greater gravity, as rendering more difficult its position as a neutral power*" (Trans. p. 182; *error 3;* italics ours).

This instruction was entirely unnecessary, and it could not but affect the jury to the prejudice of the plaintiffs in error.

The instructions so far considered were objectionable because they tended to surround the case of the plaintiffs in error with a hostile atmosphere.

INSTRUCTIONS WHICH STATE AS FACTS WHAT WERE ACTUALLY MERE ASSUMPTIONS.

We now come to a consideration of those features of the case, where the court draws its inferences and advises the jury as though they were facts in the case. For instance, the court says of the plaintiffs in error:

> "Together they formed the British Friendly Association, the purpose of which was to transport to New York British subjects sound in body and limb. It is not to be conceived, and indeed all of the circumstances negative any such conception, that they expected the journey of the men so transporated to end at New York" (Trans. p. 183; *error 4*).

What if this were so? What if the plaintiffs in error were aiding the transported men to reach New York? What if they did expect that the men on reaching New York would find some means of getting from there to England? They might arrive in England, by shipping on board some vessel bound from New York to some port in England. There is no evidence to show that the plaintiffs in error could rely upon the men to go beyond New York or knew or expected that any further assistance was to be given the transported men by the British Consulate or anyone else at New York; and yet the court concludes the instruction referred to, by saying:

> "The ultimate destination of these men was some point in the British Empire, *and the defendants knew it,*

and were jointly engaged in sending them there'' (Trans. p. 183; *error 4;* italics ours).

There was no proof whatever that the plaintiffs in error were jointly engaged in sending any men beyond New York or that they ''knew'' the ultimate destination of the men transported.

The agreed case reads: That the British Friendly Association was organized

> ''*for no other purpose* than to *facilitate* the transportation *to New York* of British subjects sound in body and limb'' (Trans. p. 102; par. 17; italics ours),

and

> ''that the defendants Blair and Addis supposed, believed and presumed that the transported men would enlist in the military or naval service of Great Britain, and it was the individual intent of a majority of said transported men to enlist in such service'' (Trans. p. 109; par. 45).

The court in its instructions to the jury thus paraphrases these two paragraphs:

> ''They (said defendants) had associated themselves together to transport to New York British subjects, sound in body and limb, *whose ultimate destination was England,* and at least a majority of whom intended to enlist there in the military or naval service, and all of whom the defendants supposed, believed and presumed would so enlist'' (Trans. p. 183; *error 5;* italics ours).

Now, it is clearly one act for two parties to associate together to transport men to New York, who may have an uncommunicated intent to go out of the country and enlist in foreign service, and who may be supposed, believed or presumed by the parties aiding them to have that intent; but it certainly cannot be asserted unquali-

fiedly that such an association was to transport to New York men "whose ultimate destination was England", because the actual ultimate destination was unknown to the plaintiffs in error, and therefore it cannot be asserted that the plaintiffs in error were definitely assisting a class of men to go to New York, whose "ultimate destination was England." The prejudice created by such a statement may be slight, but it is illustrative of the false color thrown on the screen before the jury. And however reasonable such a conclusion may have appeared to the court, it was a conclusion for the jury and not for the court to draw. And as though to emphasize this impression, the court continues to paint the picture with a stronger hand, and adds:

> "And indeed, as it was the *manifest purpose and intention* of defendants that those sent by them from San Francisco should go beyond the limits of the United States, and as it was equally the purpose of the men so sent to go beyond such limits, our inquiry is narrowed to the ascertainment of the meaning of the words 'hires or retains'" (Trans. pp. 183, 184; *error 6;* italics ours).

If the men concerned had been placed under any obligation to the plaintiffs in error to go beyond the limits of the United States, the language of the court would have been perfectly justifiable, but as the men concerned were placed under no such obligation, and in fact and in law were under no such obligation, the language of the court gives the picture just that quantity of false coloring. It was the supposition, the belief and the presumption of the plaintiffs in error that the men assisted by them to New York would go beyond the limits of the United States, and it was the individual

intent of a majority of these men to do so; but this falls short of establishing that it was the "manifest purpose and intention" of the plaintiffs in error that the transported men should go beyond the limits of the United States.

But these instructions just referred to standing alone, might appear to involve, in themselves, only trivial assumptions of facts, were they not connected with other instructions more seriously prejudicial. Thus the court said:

> "It would be taxing credulity to the utmost to urge that with the lists and instructions, the defendants did not know that what was sought by the Consul-General was men who would go to England there to enlist in the military or naval, service. They were 'to give no pay or advance'. It is not stated 'pay or advance for what'. *They were 'to make no engagements of any description whatever.'* It is not stated in the instructions what they were to do in this regard, but they were to examine the men to see if they were suitable, and to send them on, not more than fifty at a time. Evidently while under the instructions they could make no engagements, they *certainly could come to some understanding with the men that they should be sent forward for some purpose for which, after a physical examination they were found to be suitable"* (Trans. p. 187; *error 12;* italics ours).

It is not apparent what distinction existed in the mind of the court between "making engagements" and "coming to an understanding"; but the evident effect of such an instruction, upon the jury, would be to satisfy them that, notwithstanding that the Consul-General had been at considerable pains to advise the plaintiffs in error to make no engagements and thereby to avoid violating the law, the plaintiffs in error could, in some way

without violating their instructions, come to some understanding with the men which would in fact constitute a violation of the law. The instruction of the court would either suggest this thought to the jury, or would suggest the other thought to the jury, that the instructions of the Consul-General to the plaintiffs in error were a mere blind, and that the plaintiffs in error were, notwithstanding their instructions, free to make engagements with the transported men. And the psychology of jurors would thus lead them, by easy stages, to the conviction that such engagements had been made. And yet the fact whether such engagements had been made or not, the fact whether there was a conspiracy to make such engagements or not, is the pivotal point on which the guilt or innocence of the plaintiffs in error depends.

But the impression which this instruction was calculated to create on the minds of the jury was still further emphasized by further instructions. Thus the court said:

> "The men, pending and after examination, were kept at boarding and lodging houses until a sufficient number was assembled for orderly transportation. *All this was designed, and defendants knew it, to secure men to return to Great Britain and enlist"* (Trans. pp. 187-188; *error 13;* italics ours).

The statement in italics is a presumption merely, and one not even necessarily suggested by the facts agreed upon.

Then without any evidence to support the statement whatever, the court adds:

> "They (said defendants) examined the men, boarded them, lodged them, transported them in squads to New York, *where they expected them to report to the British*

Consul for further examination and further transportation" (Trans. p. 188; *error 14;* italics ours).

We have already pointed out that plaintiffs in error knew nothing about the British consul in New York.

Following this, as though to remove any lurking doubt in favor of the innocence of the plaintiffs in error on the part of the jury, the court instructs them:

> "Defendants *knew* what they expected the men to do, and the men in turn *knew* what was expected of them. Defendants, in the language of the stipulation, supposed, presumed and believed that the men would go to England and there enlist in the military or naval service, and a majority of the men intended to do so; they were furnished board, lodging and transportation *for that reason alone"* (Trans. p. 188; *error 15;* italics ours).

Here we have the court asserting that the defendants not only supposed, believed and presumed that the men would go abroad and enlist, but that they *knew* it, and that the men in turn knew that they knew it, and that they were furnished board, lodging and transportation *for that reason alone.* This was clearly assuming the whole case. Here was a definite statement that a meeting of the minds of the parties concerned was established by the facts set forth in the agreed case, a conclusion which we have shown in this brief was based not on inference alone, but was based upon inference piled upon inference, and was the result of indulging those inferences only which were consistent with guilt and disregarding those inferences, equally reasonable, which were consistent with innocence, and ignoring the presumption of innocence to which the plaintiffs in error were entitled throughout. The idea thus sought to be created in the

minds of the jury was further emphasized by the following instruction:

> "The offer of defendants was, even though never put into words, 'if you men, having been found, after examination, physically suitable, will go to England and enlist, we will furnish you with board and lodging while you are here awaiting examination and transportation, and we will furnish you with transportation to New York and sustenance during the trip'" (Trans. pp. 188, 189; *error 16*).

Of course, if the plaintiffs in error made such an offer as is referred to, and the men transported accepted it, a contract of hire was established such as the statute forbids; but the question is, did the conduct of the plaintiffs in error amount to such an offer on their part to the men transported? We have shown already that there was no express contract of hiring, and we have likewise shown that the conduct of the plaintiffs in error did not create circumstances from which a tacit obligation necessary to constitute a contract of hire would arise. This instruction to the jury was simply an inference from the facts stated in the agreed case, and an inference, too, that those facts did not support. Referring further to this offer, the court said to the jury:

> "And this offer the men accepted by submitting to examination, by accepting board, lodging, sustenance and transportation, with the intent, in the majority of them at least, to do *the thing desired*" (Trans. p. 189; *error 17;* italics ours).

There is not anything in the agreed statement of facts which shows that the men transported knew what the plaintiffs in error desired of them. We do not claim that the plaintiffs in error did not entertain the hope that the

men transported to New York would find their way to England, and would there enlist in the military or naval service of Great Britain. But we do claim that the plaintiffs in error did not *hire* any of these transported men to go out of the United States, with the intent to be enlisted in such service. They put no obligation upon them to do so, and they refrained from putting such an obligation upon them to do so, in order to avoid violating the law. If what they did, in fact, was not a violation of the law, it was then lawful; and if what they did, in fact, was conduct which the United States Government believes, if permitted, might involve it in some embarrassment in its attitude as a neutral, then it is for the Government of the United States, by appropriate legislation, to prohibit such conduct. But in the absence of such a prohibition the conduct remains lawful, and where conduct has been so shaped as to avoid violating the law, it is not an evasion of the statute.

The desire of British subjects to see numbers of their Nationals return to Great Britain and enlist in the British military service, is one which reflects credit upon them as men, involves no moral turpitude whatsoever, and unless in the fulfillment of that desire they do acts prohibited by law, there is no occasion for punishing them as felons. It seems to have been assumed that because there may have been such a desire upon the part of the plaintiffs in error, it necessarily follows that they have been guilty of violating American law. It seems to have been taken for granted that British subjects would not be assisted in their efforts to reach England, unless it was certain that, on reaching there, they would

enlist in the military service of Great Britain, and that, therefore, any assistance given them must have been associated with an obligation, on the part of the men transported, to go out of the country for the purpose of enlisting. But the plaintiffs in error, and the British Government behind them, might well have felt that they could have safely trusted to the patriotism of the British subjects assisted home, to secure their enlistment on arriving there, and therefore have appreciated that it was unnecessary to put any obligation upon them whatever, as a condition of assisting them home. If the men, on arriving in England, did not enlist, they might be useful to Great Britain in her struggle, without entering the army at all, and the Government would therefore be repaid for furnishing them the means with which to return home. They could be useful in the munition factories. They could be useful in other branches of the national service of Great Britain, without enlisting in her military or naval service. It is stipulated as a fact in the agreed statement that:

> "His Majesty, the King of Great Britain and Ireland, was at all times herein mentioned desirous of the return to Great Britain of British subjects for employment in the army and navy, *and in the various branches of the national service of all kinds*" (Trans. pp. 99, 100; par. 2; italics ours).

These considerations explain why the British Government, and the plaintiffs in error who were acting for them, were prepared and willing to arrange for the transportation of the British subjects concerned without putting any obligation upon them whatever, and without entering into contracts of hire with them, and therefore

make it evident that there was nothing improbable, or unlikely about their rendering the assistance in question to the transported men, without placing any obligations upon them.

Finally, the court added in its instructions to the jury:

> "It would be to look unto the form in utter disregard of the substance, to accept as a sufficient response to all these facts the statement that at no time did defendants or any of them expressly say in words to any of the men that they should enlist in the service of Great Britain as soldiers, sailors or marines. Just as it would be to regard the form alone and disregard the substance, to believe, in view of all the facts, that when the Consul-General turned over to Harris of the Friendly Association the lists of so-called volunteers, with the manifest intention that they should be used, the instructions accompanying them were designed for any other purpose than to secure here men to go beyond the limits of the United States for enlistment, without appearing to have violated the law; to accomplish in fact the results against which the statute is directed, and to do the things therein forbidden, without appearing to do so" (Trans. pp. 189, 190; *error 18*).

The burden of proving the guilt of the plaintiffs in error rested on the prosecution. As an essential part of that burden, it was necessary to establish that the plaintiffs in error conspired to enter definite contracts of hire with the transported men. The agreed statement establishes that at no time

> "was it expressly said by defendants or any of them in words to any of the men transported from New York, that they, the said transported men, should enlist or enter themselves in the service of Great Britain as soldiers, sailors or marines" (Trans. p. 112; par. 55).

The court thought it would be to look to "form in utter disregard of substance," to yield any importance to this statement. And yet the statement concerned negatives any express contract of hire, and leaves it for the prosecution to establish a contract of hire, by showing that the circumstances imposed upon the transported men a tacit obligation, which we have shown the circumstances did not create. Because an express obligation is definitely negatived in the agreed statement, it does not follow that this negation is pregnant with the admission that there was a tacit obligation.

The balance of the instruction referred to is designed to create the impression in the minds of the jury that the instructions of the Consul-General to the plaintiffs in error were intended merely as a blind, and that, therefore, despite the conclusions which they might otherwise draw, if they assumed that the Consul-General's instructions were followed, they must infer that the conduct of the plaintiffs in error constituted a violation of the law, and that the Consular instructions were calculated, merely, to enable the plaintiffs in error to conceal the evidences of their crime, and not to enable them to comply with the law.

Next follows the general conclusion of the court when it instructs the jury that in its opinion

> "some of the defendants did enter into the conspiracy as charged in the indictment and that defendant Blair for the purpose of effecting the object thereof committed some of the overt acts charged" (Trans. p. 190; *error 19*).

The foregoing instructions indicate very clearly how impossible it will be for this court to consider the case

now before it, on the assumption that the jury drew the necessary inferences of fact requisite to support their verdict. Those inferences were drawn by the court and very pointedly suggested to the jury not as possible inferences but as the facts in the case

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INSTRUCTIONS WHICH SHOULD HAVE BEEN GIVEN BUT WERE NOT.

But even if the court were entitled to state its conclusions as to the facts, in charging the jury, it certainly was serious error for the court, in stating those inferences, not to suggest other inferences, equally consistent with the facts in the agreed case and making for a conclusion of innocence, instead of for a conclusion of guilt. But no such further inferences were suggested. Thus, in the

U. S. Fid. & Guaranty Co., v. Des Moines Nat'l Bank (8th C. C. A), 145 Fed. 273,

Judge Van Devanter said, quoting from *Asbach v. Chicago, etc, Ry. Co.,* 74 Ia. 248, 37 N. W. 182:

> "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for they may be true, and yet they may have no tendency to prove the theory" (p. 279).

And again, in the same case, quoting from

Smith v. First National Bank, 99 Mass. 605,

Judge Van Devanter says:

> "There being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover * * * When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of these propositions against the other is essentially wrong" (p. 280).

There were two sides to the shield in this case, and the court only displayed one to the jury; the other side was not disclosed.

Thus the court erred in failing to instruct the jury that before the plaintiffs in error could be convicted the facts stated in the agreed statement must be of such a character as to exclude every reasonable hypothesis but that of the guilt of the plaintiffs in error of the offense charged (Trans. pp. 191, 192; *error 25).*

U. S. v. Hart, 78 Fed. 868; affirmed 84 Fed. 799;
U. S. v. Richard, 149 Fed. 443;
Union Pac. Coal Co. v. U. S., 173 U. S. 737, 740;
Tucker v. U. S., 224 Fed. 833.

So the court erred in failing to instruct the jury that if all the facts stated in the agreed case taken together are as compatible with innocence as with guilt, there arises a reasonable doubt requiring the acquittal of the plaintiffs in error of the offenses referred to in the indictment (Trans. p. 192; *error 26).*

U. S. Fid. & Guaranty Co. v. Des Moines Nat'l Bank, 145 Fed. 273.

See also cases above cited.

Thus the court erred in failing to instruct the jury that the acts and conduct of the plaintiffs in error, as stated in the agreed case, were entirely as consistent with the assisting or transporting to Great Britain of British subjects sound in body and limb, for employment in the various branches of the national service of all kinds, as they were with any other theory or hypothesis (Trans. p. 193; *error 28);* and in failing further to instruct the jury that, where in any given cause there are two theories or hypotheses open by which the agreed facts may be explained, one in favor of innocence and the other in favor of a criminal course, the one in favor of innocence must be accepted, and must prevail; and in failing further to instruct the jury that if the acts and conduct of the defendants, as stated in the agreed case, were as consistent with the hypothesis of assisting and transporting to Great Britain of British subjects sound in body and limb for employment in the various branches of the national service of all kinds, as they were with the hypothesis that such British subjects were assisted and transported to Great Britain for employment in the army and navy, that the jury could not convict the plaintiffs in error, but must acquit them (Trans. pp. 193, 194; *error 28).*

Thus the court erred in failing to instruct the jury that His Majesty, the King of Great Britain and Ireland, was at all the times in the agreed case mentioned desirous of the return to Great Britain of British subjects for employment in the army and navy, *and in the various branches of the national service of all kinds,* and in failing further to instruct the jury that if the facts

stated in the agreed case, taken together, were as compatible with the assisting or transporting to Great Britain of British subjects for employment in the various branches of the national service of all kinds, as they were with the hypothesis that such subjects were hired or retained for service or enlistment in the army or navy of Great Britain, that then the plaintiffs in error could not be convicted of any offense charged in the indictment (Trans. pp. 192, 193; *error 27).*

Thus the court erred in failing to instruct the jury that the acts and conduct of the plaintiffs in error stated in the agreed case, were explainable upon a hypothesis arising upon the face of the agreed case and consistent with innocence, namely, the hypothesis that the plaintiffs in error assisted the return to Great Britain of British subjects sound in body and limb, for employment in the various branches of the national service of all kinds (Trans. p. 194; *error 29).*

Thus the court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects sound in body or limb, for employment in the various branches of the national service of all kinds (Trans. p. 195; *error 31).*

Thus the court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States to aid or assist, financially or otherwise, the return to Great Britain of British subjects sound in body and limb, when such assistance, whether financial or otherwise, is given to such British subjects who voluntarily present themselves and ask for assist-

ance without disclosing their intention, and to whom assistance is given without imposing any obligation upon them to enlist or enter in the service of the King of Great Britain and Ireland as a soldier (Trans. p. 195; *error 32).*

Thus the court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects sound in body and limb, where such assistance was given by persons who supposed, believed and presumed that such British subjects would enlist in the military or naval service of Great Britain, and where it was the individual intent of a majority of such British subjects so assisted to enlist in such service (Trans. pp. 195, 196; *error 33).*

Thus the court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects sound in body and limb, even though those furnishing such assistance supposed, believed and presumed that such British subjects so assisted would enlist in the military or naval service of Great Britain, and even though it was the individual intent of a majority of such British subjects so assisted to enlist in such service, where no obligation was imposed upon such British subjects, or upon any of them, to enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman, and where no obligation was put upon the British subject so assisted to go beyond the limits or jurisdiction of the

United States with intent so to enlist (Trans. p. 196; *error 34).*

Thus the court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States to aid or assist the return to Great Britain of British subjects sound in body and limb, even though those persons furnishing such assistance supposed, believed and presumed that such subjects so aided and assisted would enlist in the military or naval service of Great Britain, and even though it was the individual intent of a majority of such British subjects so aided and assisted to enlist in such service, unless there was not only an obligation upon such British subjects so aided or assisted to enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman, or an obligation upon such British subjects to go beyond the limits or jurisdiction of the United States with an intent so to enlist, but also there was an actual engagement entered into between the persons giving such aid and assistance and the British subjects so aided and assisted, whereby such British subjects so aided or assisted should enlist or enter in the service of the King of Great Britain and Ireland as a soldier or as a marine or seaman, or should go beyond the limits or jurisdiction of the United States with the intent so to enlist, such engagement being with the intent and understanding of both parties to such engagement (Trans. pp. 196, 197; *error 35).*

Thus the court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States for individuals to go beyond the

limits or jurisdiction of the United States with intent to enlist in foreign military service (Trans. pp. 197, 198; *error 36).* This last instruction was necessary because, without it, the jury might conclude that the individual intent of the transported men to enlist, and their individual intent to leave the country for that purpose, was in itself criminal, and believing that, they would more readily assume that the plaintiffs in error thus aiding and abetting a crime, were guilty as charged even if they assisted men whom they only supposed, believed and presumed were leaving the country for that purpose.

The court erred in failing to instruct the jury that it was no crime or offense against any of the laws of the United States to transport persons out or beyond the limits or jurisdiction of the United States and to land them in foreign countries, when such persons had an intent to enlist in foreign armies (Trans p. 198; *error 37).*

> "If a Captain of a vessel should know that all his passengers were going out of the United States for the purpose of enlisting, or were hired or retained to go, he would not be liable * * * It would be no crime to obtain a ticket or hire a cab for the person who was hired or retained to go beyond the limits of the United States to enlist. These parties might all be countrymen, and these defendants possessing the most information might aid the others and go with them to obtain a passage. This was no crime."

U. S. v. Kazinski, supra, p. 685.

The Laurida, 85 Fed. 760.

Wiborg v. U. S., 163 U. S. 632; 16 U. S. Sup. Ct. R. 1135.

The court erred in instructing the jury, by adopting in its instructions, and presenting the same to the jury, an interpretation of the agreed statement of facts and a theory of the case in favor of the guilt rather than in favor of the innocence of the plaintiffs in error, and in failing to instruct the jury to adopt such an interpretation of said agreed case, and such a theory of this cause as would be in favor of the innocence, rather than in favor of the guilt of said plaintiffs in error (Trans. pp. 194, 195; *error 30).*

Thus the court erred in failing to instruct the jury that the intention and purpose of the plaintiffs in error in doing any of the acts mentioned in the agreed statement were material to the issue then before the jury, and that unless the jury were satisfied beyond all reasonable doubt, that the intention and purpose of the plaintiffs in error, in acting as shown in the agreed statement, were criminal, and that the plaintiffs in error did such acts with the intention to violate the law, and with that object, then the jury could not find the plaintiffs in error guilty of any offense under the indictment (Trans. p. 191; *error 24*).

Thus the court erred in failing to instruct the jury that not merely the bare acts of the plaintiffs in error were to be considered, but also their intention and purpose in doing any of the acts referred to in the agreed statement (Trans. p. 191; *error 23).*

Thus the court erred in failing to instruct the jury that the knowledge of either of said plaintiffs in error, of any criminal conspiracy or agreement or purpose on the part of any other person or persons, without

active co-operation by them in such criminal conspiracy, agreement or purpose, would not be sufficient to authorize or justify any finding of guilt against them (Trans. pp. 190, 191; *error 22).*

All the foregoing exceptions to the instructions of the court to the jury (assigned as errors) were made while the jury was still at the bar and before they returned their verdict (Trans. pp. 152, 170).

In view of the foregoing, we therefore claim that the court erred in those particulars set forth in the assignments of error as paragraphs 38, 41, 42, 43, 44, 45, 46 and 47 (Trans. pp. 198, 199, 200) relating to the receiving of the verdict of the jury finding the plaintiffs in error guilty under the first count, the rendition of judgment and pronouncing of sentence against the plaintiffs in error.

The errors committed prior to the trial have been referred to and considered earlier in this brief.

CONCLUSION.

It is clear, therefore, that this case, after the elaborate analysis which we have felt that it was entitled to receive, comes down to a very simple proposition, namely: Is it an offense against the laws of the United States (10 Federal Penal Code) for persons in this country to aid or assist British subjects to return to Great Britain, even though the persons so aiding or assisting them suppose, believe and presume that the persons so assisted will enter the military service of Great Britain, and it is actually the individual intent of a majority of such subjects so aided and assisted to

enter in such service, but where no obligation was imposed upon them to do so or to go beyond the limits or jurisdiction of the United States with intent to do so?

The facts of the case very clearly show that the plaintiffs in error aided and assisted persons to go from San Francisco to New York, a majority of whom actually had an intent to enter either the military or naval service of Great Britain. The facts show that this aid and assistance took the form of furnishing the men assisted with the means of transportation from San Francisco to New York, with sustenance money on the way, and with board and lodging in San Francisco while awaiting transportation. The agreed statement shows that the plaintiffs in error supposed, believed and presumed that the men so assisted would enter the military or naval service of Great Britain, but there was no obligation imposed upon any of the men, so transported, to enter the military or naval service of Great Britain, or even to go beyond the limits of the United States with that intention. The plaintiffs in error, as a matter of fact, were rendering aid and assistance under instructions to impose no such obligation, and in fact they imposed no such obligation, either expressly or impliedly. And to make out a definite contract of hire it was essential to show the imposition of such an obligation, either expressly or impliedly. The Government of the United States has wholly failed to show any definite contract of hire entered by the plaintiffs in error. It has wholly failed to show that the plaintiffs in error imposed any obligation upon the men transported, or that the circum-

stances were such as to raise any tacit obligation in the men transported. Having failed to prove the case against the plaintiffs in error, the Government has assumed it, and the court below fell into the same error. It assumed that there must have been a definite contract of hire with each one of the transported men, and concluded, therefore, that such contract of hire had been established. But this assumption we have shown is not "the only conclusion that can fairly or reasonably be drawn from" the agreed statement of facts, and is one which is, therefore, not only objectionable on this ground, but is still further objectionable under the circumstances because it disregards the presumption of innocence to which the plaintiffs in error are entitled, a presumption which has the force of evidence.

Coffin v. U. S., 156 U. S. 432; 15 U. S. Sup. Ct. Rep. 394, 405.

Of course, it is true that in the case at bar the plaintiffs in error are not accused of hiring or retaining men in violation of the statute, but are accused of conspiring to hire or retain them. But unless there is some showing that the plaintiffs in error actually hired or retained men, unless the facts of the case are sufficient to establish such a hiring or retaining, there is nothing to establish or show any conspiracy on their part, for there is nothing to establish or show any combination or concert upon the part of the plaintiffs in error to do other than what it is disclosed they did in the agreed statement of facts. The wholesale assumptions of facts in the trial of this case, the disregard of the presumption of innocence, the discarding of every hypothesis consistent

with innocence which might with equal fairness and reasonableness be drawn from the agreed statement of facts, suggests, as quite apposite to the case, a circumstance narrated in

Coffin v. U. S., supra.

It there appeared that Numerius, on trial before the Emperor, "contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man', seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' "

The fact that the indictment in this case charged a violation of the American Neutrality Laws, the grave interest which the Government might properly be assumed to take in such a charge, the more or less vague notions which prevail, unfortunately, as to the obligations of a neutral under international law, coupled with the impression that the American Neutrality Statute, adopted in 1794, is sufficient to enforce all the obligations of neutrality under international law, as those obligations may be recognized in 1915, the inclination to assume vague notions about what constitutes recruiting, and to assume further that the statute, instead of being directed against hiring or retaining, is aimed at recruiting, may all have a tendency to account for the conviction of the plaintiffs in error in the case at bar, but in our analysis of those questions we submit that we have shown they do not in point of law justify

the verdict of the jury or the judgment of the court below.

The American Neutrality Statute is not directed against recruiting, it does not prohibit the recruiting for foreign armies on American territory, except as that recruiting may take the form of an actual enlistment or entering the service of a foreign nation upon American soil, or may take the form of hiring or retaining persons upon American soil to enlist or enter into foreign service, or to go beyond the limits or jurisdiction of the country with intent to do so. Any form of recruiting, if there be such, which falls short of this, is not prohibited. The mere fact that the acts of the plaintiffs in error might result ultimately in securing British soldiers for the British service, is a false quantity here, and has no bearing upon the guilt or innocence of the accused.

> "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached".
>
> *Doyle v. Continental Ins. Co.,* 94 U. S. 535, 541.

The fact that the acts of the plaintiffs in error might result in Great Britain securing from this country British subjects for service in the British army, can no more affect the neutrality of this country than is the neutrality of this country affected by the fact that it permits the subjects of those belligerents which have compulsory military service laws to withdraw their Nationals from this country. Yet the right of belligerents, having compulsory military service laws, and, therefore, not relying upon enlistments, to withdraw

their Nationals, has not only been exercised, but has not been questioned; and it is clear that the assisting home of the Nationals of such belligerents would not constitute a violation of the American Neutrality Statute. For the same reason, it must be equally clear that it would make for unneutrality rather than neutrality, to give the American statute a forced construction to cover such circumstances as those involved in the case at bar. As there is a way under our law whereby the belligerent nations, having compulsory military service can withdraw their Nationals without violating our law, it should be a matter of satisfaction, provided this country desires to preserve a strictly neutral attitude, that under our laws a way can be found whereby countries can likewise withdraw their Nationals which rely upon actual enlistment as necessary to bring about the status of a soldier. We submit, therefore, that sufficient error has been show to justify a reversal of the judgment of conviction.

The plaintiff in error, Addis, does not intend to file a separate brief in this cause, but we are authorized by his counsel to state that they accept the foregoing brief as one submitted on his behalf, and that they desire the court to regard this brief as submitted for the plaintiff in error, Addis, as well as for the plaintiff in error, Blair.

Dated, San Francisco,
March 15, 1916.

Respectfully submitted,

J. J. Dunne,
Allen G. Wright,
Attorneys for Plaintiff in Error,
Ralph K. Blair.

Appendix One.

TABLE COMPARING SECTIONS OF NEUTRALITY STATUTES.

Scope of Sections	Act of 1794	Act of 1797	Act of 1817	Act of 1818	Rev. Stat.	Penal Code
Offenses	Sec. 1	omitted	omitted	Sec. 1	Sec. 5281	Sec. 9
"	" 2	"	"	" 2	Sec. 5282, 5291	Sec. 10, 18
"	" 3	"	Sec. 1	" 3	Sec. 5283	Sec. 11
"	" 4	"	" 4	" 5	" 5285	" 12
"	" 5	"	omitted	" 6	" 5286	" 13
"	omitted	Sec. 1	"	" 4	" 5284	omitted
Administrative	Sec. 6	omitted	"	" 7	" 5287	Sec. 14
"	" 7	"	"	" 8	" 5287	" 14
"	" 8	"	"	" 9	" 5288	" 15
"	omitted	"	Sec. 2	" 10	" 5289	" 16
"	"	"	" 3	" 11	" 5290	" 17
Piracy & Treason	Sec. 9	Sec. 2	omitted	" 13	" 5291	" 18
Temp. Term	" 10	omitted	Sec. 5	omitted	omitted	omitted
Repeals	omitted	"	omitted	Sec. 12	"	Sec. 341

The foregoing table shows that Sections 1 to 5 of the Act of 1794 which defined offenses against neutrality are the basis of Sections 9 to 13 of the Federal Penal Code which now define those offenses. Except for slight changes in phraseology not affecting any matter of

Note.—The proviso found in Sec. 2 of the Act of 1794 and in Sec. 2 of the Act of 1818 became Sec. 5291, U. S. Rev. Stat., and is now found in Sec. 18 of the Federal Penal Code.

principle the sections which now define offenses are what they were as adopted in 1794. The exact changes made in Section 2 of the Act of 1794 (Sec. 2 of Act of 1818; 5282 U. S. Rev. Stat.) and now 10 Fed. Pen. Code are indicated in Appendix Two.

Appendix Two.

ACT OF 1794.

"Sec. 2. And be it further enacted and declared, That if any person shall within the territory or jurisdiction of the United States enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years. (1) Provided, That this shall not be construed to extend to any subject or citizen of a foreign prince or state who shall transiently be within the United States and shall on board of any vessel of war, letter of marque or privateer, which at the time of its arrival within the United States was fitted and equipped as such, enlist or enter himself or hire or retain another subject or citizen of the same foreign prince or state, who is transiently within the United States, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque or privateer, if the United States shall then be at peace with such prince or state. (2) And provided further, That if any person so enlisted shall within thirty days after such enlistment voluntarily discover upon oath to some justice of the peace or other civil magistrate, the person or persons by whom he was so

enlisted, so as that he or they may be apprehended and convicted of the said offence; such person so discovering the offender or offenders shall be indemnified from the penalty prescribed by this act" (numbers in parenthesis ours).

Sec. 2, 1 Stats. at Large 383.

ACT OF 1818.

"Sec. 2. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, *colony, district, or people,* as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years; Provided, That this act shall not be construed to extend to any subject or citizen of any foreign prince, state, *colony, district or people,* who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States, was fitted and equipped as such to enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, *colony, district or people,* who is transiently within

Note: The second proviso of Section 2 of the Act of 1794 is dropped in the corresponding section below of the Act of 1818.

the United States, to enlist or enter himself to serve such foreign prince, state, *colony, district, or people,* on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, *colony, district, or people.*"

Sec. 2, 3 Stats. at Large 448.

SECTION 5282 U. S. REVISED STATUTES.

"*Every person who,* within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque or privateer, shall be deemed guilty of high misdemeanor and shall be fined not *more than* one thousand dollars, and imprisoned not *more than* three years".

SECTION 10, FEDERAL PENAL CODE.

"*Whoever,* within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as

Note: For an explanation of the reason for adding "colony, district or people" see "The Three Friends", 166 U. S. 1, 17 U. S. Sup. Court Rep. 495, 499.

Note: The proviso to Section 2 of the Act of 1818 became Section 5291 United States Revised Statutes.

a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque or privateer shall be [.....] fined not more than one thousand dollars, and imprisoned not more than three years."

In stating the law as above where changes have been made in subsequent enactments, they are indicated by underlining the new words, or by indicating omissions with brackets.

Note: The proviso contained in Section 5291 U. S. Revised Statutes is now found in 18 Federal Penal Code.

Appendix Three.

"An Act for the better discovering and repressing of popish recusants." (3 Jac. I, Chap. IV).

"XVIII. And forasmuch as it is found by late experience, that such as go voluntarily out of this realm of England to serve foreign princes, states or potentates, are for the most part perverted in their religion and loyalty by Jesuits and fugitives, with whom they do there converse; (2) be it therefore enacted by the authority aforesaid, That every *subject* of this realm that after the tenth day of June next coming shall go or pass out of this realm to serve any foreign prince, state or potentate, or shall after the said tenth day of June pass over the seas, and there shall voluntarily serve any such foreign prince, state or potentate, not having before his or their going or passing as aforesaid taken the oath aforesaid before the officer hereafter appointed, shall be a felon.

XIX. And that if any gentleman or person of higher degree, or any person or persons which hath borne or shall bear any office or place of captain, lieutenant or any other place, charge or office in camp, army or company of soldiers, or conductor of soldiers, shall after go or pass voluntarily out of this realm to serve any such foreign prince, state or potentate, or shall voluntarily serve any such prince, state or potentate before that he and they shall become bound by obligation, with two such sureties as shall be allowed of by the officers which are hereafter by this act limited to take the same bond,

unto our sovereign lord the King's majesty, his heirs or successors, in the sum of twenty pounds of current English money at the least, with condition to the effect following, shall be a felon.

The tenor of which condition followeth, viz.

XX. That if the within bounden, etc.''

7 Stat. L. 157, 158; 1605.

Appendix Four.

"An Act to prevent the listing her Majesty's subjects to serve as soldiers without her Majesty's license." (13 Anne, Chap. X.)

"Be it therefore enacted by the Queen's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by and with the Authority of the same That if any Subject of the Crown of Great Britain from and after the First Day of August next shall within the Kingdom of Great Britain or Ireland or from and after the First Day of October next without the same list or enter himself or procure any Person being a Subject of Her Majesty Her Heirs or Successors to list or enter himself or hire or retain any Person being a Subject of Her Majesty Her Heirs or Successors with an Intent to cause such Person to list or enter himself or procure any Person being a Subject of Her Majesty Her Heirs or Successors to go beyond the Seas or embark with Intent and in order to be listed to serve any Foreign Prince State Potentate or Person whatsoever as a Soldier without Leave or License of Her Majesty Her Heirs or Successors first obtained for listing any of the Subjects of Her Majesty Her Heirs or Successors to serve any such Foreign Prince State or Potentate or Person as Soldiers under the Sign Manual of Her Majesty Her Heirs or Successors every such Person so offending being thereof lawfully convicted shall be taken deemed and adjudged to be guilty

of High Treason and shall suffer and forfeit as in Cases of High Treason.

And be it further enacted by the Authority aforesaid That where any Offences against this Act shall be committed out of this Realm the same may be alledged and laid inquired of and tryd in any County of Great Britain.

Provided always That no license shall be effectual to exempt any Person from the Penalty of this Act who shall list or cause to be listed or entred any of the Subjects of Her Majesty Her Heirs or Successors in the Service of the French King until after that the said French King shall have disbanded broke and dismissed all the Regiments Troops or Companies of Soldiers which he hath or may have in His Service consisting of the natural-born Subjects of the Crown of Great Britain.

Provided always That this Act shall continue in force for Three Years from the said First Day of August and to the End of the next Session of Parliam.t after the Expiration of the said Three Years and no longer."

Statutes of the Realm, 1821, Reprint (12 Anne, Chap. XI; 1713).

Appendix Five.

"An act to prevent the listing of his Majesty's subjects to serve as soldiers without his Majesty's license." (9 Geo. II, Chap. 30.)

"Whereas divers of his Majesty's subjects have been of late seduced to enlist themselves to serve as soldiers under foreign princes, states, or potentates, which practice is highly prejudicial to the safety and welfare of this kingdom; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any subject of the crown of Great Britain, from and after the twenty-fourth of June next, shall within the kingdom of Great Britain or Ireland, or from and after the twenty ninth day of September next without the same, enlist or enter himself, or if any person shall procure any subject of his Majesty, his heirs or successors, to enlist or enter himself, or hire or retain any person being a subject of his Majesty, his heirs or successors, with an intent to cause such person to enlist or enter himself, or procure any person being a subject of his Majesty, his heirs or successors, to go beyond the seas, or embark, with an intent and in order to be enlisted to serve any foreign prince, state, or potentate, as a soldier, without leave or license of his Majesty, his heirs or successors, first had and obtained for enlisting any of the subjects of his Majesty, his heirs or successors, to serve any such foreign prince, state, or potentate, as soldiers, under the sign manual

of his Majesty, his heirs or successors, every such person so offending, being thereof lawfully convicted, shall be taken, deemed, and adjudged, to be guilty of felony, and shall suffer death as in cases of felony without benefit of clergy.

II. And be it further enacted by the authority aforesaid, That where any offence against this act shall be committed out of this realm, the same may be alledged to be committed, and may be laid, enquired of, and tried, in any county in England.

III. Provided always, and be it further enacted by the authority aforesaid, That in case any person so enlisted, or inveigled, or enticed to go beyond the seas in order to be enlisted, as a non-commissioned officer, or private soldier, in any foreign service, without his Majesty's licence first had and obtained as aforesaid, shall within fourteen days after such enlisting or agreement to go beyond the seas, voluntarily discover upon oath before any of his Majesty's justices of the peace or other civil magistrate, the person or persons by whom he was so enlisted, inveigled or enticed, as aforesaid, so as he or they may be apprehended and convicted of the said offence, such person or persons so discovering as aforesaid, shall be indemnified from the penalty inflicted by this act, and all other penalties whatsoever on account of the said offence."

9 Geo. II, c. 30-18 Stat. at Large 44 (1736).

Appendix Six.

"An act to prevent his Majesty's subjects from serving as officers under the French King; and for the better enforcing an act passed in the ninth year of his present Majesty's reign, to prevent the enlisting his Majesty's subjects to serve as soldiers without his Majesty's licence; and for obliging such of his Majesty's subjects as shall accept commissions in the Scotch Brigade, in the service of the states general of the united provinces, to take oaths of allegiance and abjuration." (29 Geo. II, Chap. 17).

"Whereas divers of his Majesty's subjects have been induced to serve as officers under the French King, which practice is highly to the dishonour, and is greatly prejudicial to the safety and welfare of this kingdom; for remedy thereof, be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any subject of the crown of Great Britain, from and after the first day of May one thousand seven hundred and fifty six, shall take or accept of any military commission, or otherwise enter into the military service of the French King, as a commissioned or non-commissioned officer, without leave or licence of his Majesty, his heirs or successors, first had and obtained for that purpose, under the sign manual of his Majesty, his heirs or successors, every such person so offending, being thereof lawfully convicted, shall be taken, deemed and adjudged guilty of a felony, and

shall suffer death as in cases of felony, without benefit of clergy.

II. And be it further enacted by the authority aforesaid, That if any commissioned or non-commissioned officer, or private soldier (being a subject of the crown of Great Britain) who may be now in the said service, without his Majesty's licence first had and obtained as aforesaid, do and shall, on or before the twenty ninth day of September one thousand seven hundred and fifty seven, return into this kingdom, with intent to become, and shall become, a dutiful and faithful subject of his Majesty, his heirs and successors, and surrender himself to any one or more of his Majesty's justices of the peace within this kingdom, and shall within the time aforesaid, with good and sufficient sureties, enter into a sufficient recognizance to appear at the next general assizes, or general quarter session of the peace to be held for the county in which he or they shall so surrender, and shall at such general assizes, or quarter sessions of the peace, take and subscribe the oaths of allegiance and abjuration in open court, such officer and soldier shall from thenceforth be exempted and freed from all offenses, penalties and forfeitures created by this act, or by any other act, against inlisting in foreign service; any thing in this act, or in any former act, to the contrary thereof in any wise notwithstanding.

III. And be it further enacted, That if any commissioned or non-commissioned officers or private soldiers (subjects of the crown of Great Britain) who are now in the service of the French King, shall remain and continue in such service, from and after the said twenty

ninth day of September one thousand seven hundred and fifty seven, without leave or licence from his Majesty, his heirs and successors, first had and obtained, under the sign manual of his Majesty, his heirs or successors, all and every such persons and person so offending, being thereof lawfully convicted, shall be taken, deemed and adjudged to be guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.

IV. And whereas a practice has been introduced in order to evade and elude the provisions made by an act passed in the ninth year of his present Majesty's reign, intituled, An act to prevent the listing his Majesty's subjects to serve as soldiers without his Majesty's licence, by hiring, retaining, or procuring his Majesty's subjects to go beyond the seas, or embark, with an intent upon their arrival abroad, to inlist and enter themselves to serve as soldiers in foreign service, without actually giving them any inlisting money at the time of their so procuring them to go abroad, with the intent aforesaid; and whereas a doubt has arose, whether the so hiring, retaining or procuring, his Majesty's subjects, with intent to embark, and go beyond the seas, to be inlisted when abroad to serve as soldiers in foreign service, without actually paying to such persons, and their receiving inlisting money here from the persons so hiring, retaining or procuring, be an inlisting within the meaning and intention of the said act of the ninth of his present Majesty, as to make such person liable to the provisions and penalties of the said act; for removing the said doubt, *and for the*

more effectually preventing a practice so highly detrimental to this kingdom; be it declared and enacted, That if any subject of the crown of Great Britain hath engaged, contracted or agreed, or shall engage, contract or agree, within the kingdom of Great Britain or Ireland, to go beyond the seas, or embark, with an intent and in order to inlist and enter himself to serve as a soldier in any foreign service, though no enlisting money be actually paid to or received by him; or if any person hath hired, retained, engaged or procured, or shall hire, retain, engage or procure any subject of his Majesty, his heirs or successors, though no inlisting money hath been or shall be actually paid to or received by him, to agree to go beyond the seas or embark, with an intent and in order to be inlisted to serve any foreign prince, state or potentate, as a soldier, without leave or licence of his Majesty, his heirs or successors, first had and obtained for that purpose, every such person so offending, being thereof lawfully convicted, shall be adjudged to be guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.''

29 Geo. II, c. 17-21 Stats. at Large 403 (1756).

Appendix Seven.

"An Act to prevent the enlisting or engagement of His Majesty's Subjects to serve in Foreign Service, and the fitting out or equipping, in his Majesty's Dominions, Vessels for Warlike Purposes, without his Majesty's Licence." (59 Geo. III, Chap. 69.)

"Whereas the Enlistment or Engagement of his Majesty's Subjects to serve in War in Foreign Service, without His Majesty's Licence, and the fitting out and equipping and arming of Vessels by His Majesty's Subjects, without His Majesty's Licence, for Warlike Operations in or against the Dominions or Territories of any Foreign Prince, State, Potentate or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province or Part of any Province, or against the Ships, Goods or Merchandise of any Foreign Prince, State, Potentate or Persons as aforesaid, or their Subjects, may be prejudicial to and tend to endanger the Peace and Welfare of the Kingdom: And Whereas the Laws in force are not sufficiently effectual for preventing the same: Be it therefore enacted by The King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act, an Act passed in the Ninth Year of the Reign of his late Majesty King George the Second, intituled An Act to prevent the listing His Majesty's Subjects to serve as Soldiers without his Majesty's Licence; and

also an Act passed in the Twenty ninth Year of the Reign of His said late Majesty King George the Second, entituled An Act to Prevent His Majesty's Subjects from serving as Officers under the French King; and for better enforcing an Act Passed in the Ninth Year of his Present Majesty's Reign to prevent the enlisting His Majesty's Subjects to serve as Soldiers without His Majesty's Licence; and for obliging such of His Majesty's Subjects as shall accept Commissions in the Scotch Brigade in the Service of the States General of the United Provinces, to take the Oaths of Allegiance and Abjuration; and also an act passed in Ireland in the Eleventh Year of the Reign of His said late Majesty King George the Second, intituled An Act for the more effectual preventing the enlisting of His Majesty's Subjects to serve as Soldiers in Foreign Service without His Majesty's Licence; and also an Act passed in Ireland in the Nineteenth Year of the Reign of His said late Majesty King George the Second, intituled An Act for the more effectual preventing His Majesty's Subjects from entering into Foreign Service, and for Publishing an Act of the Seventh Year of King William the Third, intituled 'An Act to prevent Foreign Education'; and all and every the Clauses and Provisions in the said several Acts contained, shall be and the same are hereby repealed.

II. And be it further declared and enacted, That if any natural born Subject of His Majesty, His Heirs and Successors, without the Leave or Licence of His Majesty, His Heirs of Successors, for the Purpose first had and obtained, under the Sign Manual of His Maj-

esty, His Heirs or Successors, or signified by Order in Council, or by Proclamation of His Majesty, His Heirs or Successors, shall take or accept, or shall agree to take or accept, any Military Commission, or shall otherwise enter into the Military Service as a Commissioned or Non-commissioned Officer, or shall enlist or enter himself to enlist, or shall agree to enlist or enter himself to serve as a Soldier, or to be employed or shall serve in any Warlike or Military Operation, in the Service of or for or under or in aid of any Foreign Prince, State, Potentate, Colony, Province or Part of any Province or People, or of any Person or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province or Part of any Province or People, either as an Officer or Soldier, or in any Military Capacity; or if any natural born Subject of His Majesty shall, without such Leave or Licence as aforesaid, accept, or agree to take or accept, any Commission, Warrant or Appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, to serve as a Sailor or Marine, or to be employed or engaged, or shall serve in and on board any Ship or Vessel of War, or in and on board any Ship or Vessel used or fitted out, or equipped or intended to be used for any Warlike Purpose, In the Service of or for or under or in aid of any Foreign Power, Prince, State, Potentate, Colony, Province or Part of any Province or People, or of any Person or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province or Part of any Province or

People; or if any natural born Subject of His Majesty shall, without such Leave and Licence as aforesaid, engage, contract or agree to go, or shall go to any Foreign State, Country, Colony, Province or Part of any Province, or to any Place beyond the Seas, with an intent or in order to enlist or enter himself to serve, or with intent to serve in any Warlike or Military Operations whatever, whether by Land or by Sea, in the Service of or for or under or in aid of any Foreign Prince, State, Potentate, Colony, Province or Part of any Province or People, or in the Service of or for or under or in aid of any Person or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province or Part of any Province or People, either as an Officer or a Soldier, or in any other Military Capacity, or as an Officer or Sailor, or Marine, in any such Ship or Vessel as aforesaid, although no enlisting Money or Pay or Reward shall have been or shall be in any or either of the Cases aforesaid actually paid to or received by him, or by any Person to or for his Use or Benefit; or if any Person whatever, within the United Kingdom of Great Britain and Ireland, or in any Part of His Majesty's Dominions elsewhere, or in any Country, Colony, Settlement, Island, or Place belonging to or subject to His Majesty, *shall hire, retain, engage or procure,* or *shall attempt or endeavor to hire, retain, engage or procure,* any Person or Persons whatever to enlist, or to enter or engage to enlist, or to serve or to be employed in any such Service or Employment as aforesaid, as an Officer, Soldier, Sailor or Marine,

either in Land or Sea Service, for or under or in aid of any Foreign Prince, State, Potentate, Colony, Province or Part of any Province or People, or for or under or in aid of any Persons or Persons exercising or assuming to exercise any Powers of Government as aforesaid, or to go or to agree to go or embark from any Part of His Majesty's Dominions, for the purpose or with intent to be so enlisted, entered, engaged or employed as aforesaid, whether any enlisting Money, Pay or Reward shall have been or shall be actually given or received, or not; in any or either of such Cases, every Person so offending shall be deemed guilty of a Misdemeanor, and upon being convicted thereof, upon any Information or Indictment, shall be punishable by Fine and Imprisonment, or either of them, at the Discretion of the Court before which such Offender shall be convicted."

59 Geo. III, c. 69-59 Stat. at Large 420 (3 July, 1819).

Appendix Eight.

"An Act to regulate the conduct of Her Majesty's Subjects during the existence of hostilities between foreign states with which Her Majesty is at peace" (9th August 1870).

"4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid——

He shall be guilty, etc.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent——

He shall be guilty, etc.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within

Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state——

He shall be guilty, etc.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following person, in this Act referred to as illegally enlisted persons; that is to say,

(1) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state:

(2) Any person, being a British subject, who without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commis-

sion or engagement in the military or naval service of any foreign state at war with a friendly state:

Such master or owner shall be guilty, etc."

33 & 34 Victoria, Chap. 90; V Law Reports 1870-71 (Statutes), pp. 560 et seq.